TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 67

CITY OF HAMMOND, PETITIONER,

vs.

SCHAPPI BUS LINE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 21, 1928

CERTIORARI GRANTED OCTOBER 11, 1928

(31,951)

(31,951)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 385

CITY OF HAMMOND, PETITIONER,

vs.

SCHAPPI BUS LINE, INC.

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1 Placita.

Pleas and proceedings had in the District Court of the United States for the District of Indiana begun, and holden, at the United States court house in the City of Hammond, in said District before the Honorable Thomas W. Slick, one of the judges of said District Court.

United States of America } ss:

IN THE UNITED STATES DISTRICT COURT

For the District of Indiana

Schappi Bus Line, Incorporated, a corporation, *Plaintiff*,
vs.
City of Hammond, a municipal corporation, *Defendant*.
} No. 29 in Equity at Hammond.

COMPLAINT FOR INJUNCTION.

Be It Remembered That Heretofore, to-wit:—on the 28th day of July, A. D. 1925, before the Honorable Thomas W. Slick, one of the Judges of said Court, the following proceedings in the above entitled cause were had, to-wit:

Comes now the plaintiff, Schappi Bus Line, Incorporated, a corporation, and files herein its verified complaint for injunction, which complaint is in words and figures following, to-wit:

2 PLAINTIFF'S EXHIBIT 1.

* * * * * *

The plaintiff complains of the defendant and says:—that plaintiff is a corporation duly organized and doing business under and by virtue of the laws of the State of Illinois; that, its full corporate name is: Schappi Bus Line, Incorporated; that, as such corporation, it is a citizen and resident of the State of Illinois; and has its principal and only offices in said State; that, the defendant City of Hammond is a municipal corporation duly organized and existing, as such municipal corporation, under and by virtue of the laws of the State of Indiana; and, as such municipal corporation, exists only in and within the State of Indiana as such municipality, and not otherwise.

Plaintiff further says, that, this plaintiff is engaged in business as a common carrier of passengers for hire, from the City of Chicago in the State of Illinois to the City of Hammond, and other points in and within the State of Indiana, by means of motor busses owned and operated by it on, upon, and over, the public highways of said States of Illinois and Indiana, between the said City of Chicago in the State of Illinois, and the City of Hamond in the State of Indiana, and other points in the State of Indiana; that, plaintiff's principal business is the carrying of through passengers only, that is to say: that, plaintiff is engaged chiefly in carrying passengers from Chicago, Illinois, to the City of Hammond, Indiana, and other points in and within the State of Indiana, and in carrying passengers from the City of Hammond, and other points in the State of Indiana, to the City of Chicago, Illinois; that except as hereinafter otherwise stated, it does not, and has not at any time, engaged in local or intra-state carrying of passengers; that, it accepts passengers only, who desire passage and convey-

3 ance from the State of Illinois into the State of Indiana, and from the State of Indiana into the State of Illinois; that, its business is strictly interstate, and not otherwise; that, the terminal point at which plaintiff delivers passengers in the City of Chicago, Illinois, and from which plaintiff starts its motor busses in the carrying of passengers from Chicago, Illinois, into the State of Indiana, is, to-wit:—at the intersection of South Park Avenue and 63rd Street in

the City of Chicago, Cook County, Illinois, at which point this plaintiff, by means of its motor bus transportation, as aforesaid, delivers its passengers to and receives passengers from the Chicago Elevated Railway System.

And, plaintiff further says: that, from said point in the City of Chicago, Illinois, it carries its said passengers southward on South Park Avenue, one of the public streets of said City of Chicago, to South Chicago Avenue; by way of South Chicago Avenue; 95th Street; Ewing Avenue; and 106th Street, to Indianapolis Boulevard and the Indiana State Line, and over Indianapolis Boulevard in the City of Hammond and in the State of Indiana; Calumet and Sheffield Avenues; Hohman Street, and other public streets in the City of Hammond, and in the State of Indiana, delivering its passengers at such points in the City of Hammond as the passengers desire to alight when such point is arrived at; that, the principal point at which passengers are delivered is, on Hohman Street near State Street in said City, in front of the Indiana Hotel, one of the principal hotels in the City of Hammond, Lake County, Indiana; that, each and all of said streets over which plaintiff operates its said motor busses from said point in the City of Chicago, Illinois, to the City of Hammond, at and in front of said Indiana Hotel, as aforesaid, are each and all public highways; that said public highways have been constructed at public expense; in part, by the State of Indiana; in part, by the resident property owners whose property abutt upon said streets, by means of special assessments levied upon the abutting property; and, in part, as this plaintiff is informed and so alleges the fact to be, by means of Federal aid out of the funds appropriated by the United States Government for road building purposes in conjunction with the several states of the Union; that, said route above described is the most direct, popular, and serviceable route between the said City of Chicago, Illinois, and the said City of Hammond, Indiana.

That, plaintiff also receives and accepts passengers, wishing to be carried from the City of Hammond, Indiana, and from points within said City of Hammond, Indiana, to Chicago, Illinois, delivering such passengers at its terminal point aforesaid in the City of Chicago, Illinois; that,
4 plaintiff, in the operation of its said bus line, has so arranged its schedule that one bus leaves 63rd Street and South Park Avenue in the City of Chicago, Illinois, at 6:00 o'clock A. M. on each day, and an additional bus leaves said

point every twenty (20) minutes thereafter, until 1:00 o'clock A. M. of the following day, for Hammond, Indiana; that, likewise, at 6:00 o'clock A. M. one bus starts from the intersection of State and Hohman Streets in the City of Hammond, immediately in front of, and adjacent to, said Indiana Hotel, for Chicago, Illinois, and one additional bus starts every twenty (20) minutes thereafter until 12:00 o'clock midnight of said day, thus giving, between said points, twenty-minute service each way throughout the entire business day; that, for such service and carrying passengers as aforesaid, plaintiff charges its passengers a fare of twenty-five ($.25) Cents for each passenger over the age of twelve (12) years, and one-half (½) of said sum for children under the age of twelve (12) years; that, plaintiff does not accept passengers, on the trip going from Hammond, Indiana, to Chicago, Illinois, who wish to alight at any point within the City of Hammond, or the State of Indiana; and, plaintiff does not accept passengers on the trip from Chicago, Illinois, to the City of Hammond, who wish to alight at any point within the City of Chicago, or the State of Illinois, but accepts only through passengers, as aforesaid.

That plaintiff's said busses, used in said service, are of the latest approved type of motor busses, sufficiently large to carry twenty-five (25) adult persons in each bus; and said busses, in their regular schedule, each make said trip from Hammond to South Park Avenue and 63rd Street in the City of Chicago in forty (40) minutes from the time of leaving; and, likewise, make the trip from South Park Avenue and 63rd Street in the City of Chicago to the business portion of the City of Hammond, Indiana, in forty (40) minutes.

That, plaintiff carries on its said busses over said line daily approximately fifteen hundred (1500) people as passengers; that, plaintiff has procured motor bus licenses, automobile licenses, and vehicle licenses, all as required by the laws of the State of Illinois and the State of Indiana, for all busses, and is ready, able, and willing to comply with all valid and reasonable regulations in the mode, manner, and speed regarding the operation of said busses over said public highways, and has at all times endeavored to fully comply with all valid existing state laws, rules, and regulations governing the operation of motor busses over, along, and upon said public highways in the said State of Illinois, and in the said State of Indiana.

5 That, plaintiff began the operation of said bus line from the City of Chicago, as aforesaid, to the City of Hammond on the 9th day of April, A. D. 1925, and has operated said bus line, and number of busses as hereinabove alleged, daily ever since said date, and is now operating the same.

And, plaintiff further says, that, on the 25th day of May, A. D. 1925, it filed with the Public Service Commission of Indiana, its written verified application for Certificate of "Public Convenience and Necessity" to operate its said auto busses, as common carriers of passengers from said City of Hammond, Indiana, to Chicago, Illinois, doing only interstate business over said line, as aforesaid; and over said streets, as aforesaid; and with its application, filed with said Public Service Commission, a policy of insurance, as required by the laws of the State of Indiana, with the Hartford Accident and Indemnity Company of Hartford, Connecticut, all as required by the laws of said State.

Tht afterwards, on the 6th day of June, A. D. 1925, a public hearing was had before said Public Service Commission, in the City of Indianapolis; and the said defendant City of Hammond appeared before said Public Service Commission, by its City Attorney, and all other persons, who wished to protest against said petition and the granting of such Certificate, likewise appeared; and said Public Service Commission of Indiana heard the evidence, and, after hearing the evidence, and being sufficiently advised, duly found in favor of this plaintiff, and granted to said plaintiff a Certificate of "Public Convenience and Necessity" on the 24th day of July, A. D. 1925; that, said finding of said Public Service Commission is now in full force and effect, and was duly given; and, said Certificate of "Convenience and Necessity" was duly issued by said Public Service Commission to this plaintiff, and is now in full force and effect, authorizing, and empowering, and granting permission to this plaintiff to continue the operation of its said auto busses in the carrying of passengers for hire, between the Cities of Hammond, Indiana, and Chicago, Illinois, all as aforesaid.

And, plaintiff further says, that, in addition to the bus line and service above carried on by this plaintiff between the cities of Chicago, Illinois, and Hammond, Indiana, as aforesaid, it also operates and maintains a line of busses from Calumet City, Illinois, into the State of Indiana, through the said City of Hammond into, and through, a part of the

City of East Chicago in said State of Indiana; that, on said bus line from Calumet City to East Chicago, as aforesaid, this plaintiff also maintains a similar service, giving twenty-minute service over its said line, and over the public streets leading from Calumet City, Illinois, to East Chicago, Indiana; that, to carry on this service, it operates two additional busses of similar make, capacity, and speed; and, on said route, it carries approximately seven hundred (700) people daily.

And, plaintiff further says, that, it began operating said bus line from Calumet City into the City of Hammond, through the City of Hammond, to the City of East Chicago, more than ninety (90) days prior to the taking effect of Chapter 46 of the Acts of the General Assembly of the State of Indiana for the year 1925, and continued to operate, and still continues to operate said bus line; that, on the 25th day of May, 1925, plaintiff filed with the Public Service Commission of Indiana, a verified ninety-day application for a Certificate of "Public Convenience and Necessity" for the operation, by plaintiff, of motor vehicles as common carriers of passengers for hire on, and upon, said public highways in the State of Indiana, pursuant to the conditions and provisions of said Chapter 46 of the Acts of the General Assembly of the State of Indiana for the year 1925; and, that, thereafter, upon full hearing, on the 5th day of June, 1925, the Public Service Commission of Indiana approved said petition and granted to this plaintiff a Certificate of "Public Convenience and Necessity," authorizing, and directing, and permitting this plaintiff to continue to so transport passengers as a common carrier for hire upon the public highways of the State of Indiana over the following route, to-wit:

"From Indiana State Line to East Chicago, Indiana, passing through Hammond over the following route: Leave Garfield Avenue and Harrison Street; East on Garfield to Lincoln; South on Lincoln to 154th Street; East on 154th Street to Forsythe; South on Forsythe to 156th Street; East on 156th Street to Hohman; North on Hohman to State Street; East on State Street to Calumet Avenue; North on Calumet to 150th Street; East on 150th to Forsythe (East Chicago); North on Forsythe to Chicago Avenue; East on Chicago Avenue to Euclid Avenue; North on Euclid Avenue to General American Tank Car Corporation,"

and to use, in such transportation, the motor vehicles de-

scribed in its application, to-wit:—auto busses, as aforesaid.

7 That, further, in compliance with said law and the Acts of the General Assembly for the year 1925, as aforesaid, this plaintiff filed with the Public Service Commission of Indiana its policy of insurance, executed by the Hartford Accident & Indemnity Company of Hartford, Connecticut, containing insurance indemnities as required by law, and not to exceed Fifty Thousand ($50,000.00) Dollars, all as required by said Acts of the General Assembly for the year 1925, and the laws of said State of Indiana; that, said Certificate of "Public Convenience and Necessity," so issued by the Public Service Commission of Indiana to this plaintiff, is now, and at all times since June 5, 1925, has been, in full force and effect, and that the same was duly issued, as aforesaid, by said Public Service Commission of Indiana to this plaintiff, and that plaintiff is now operating its said motor busses in the carriage of passengers, as aforesaid, under, pursuant to, and in accordance with the provisions of said Certificate of "Public Convenience and Necessity," and the provisions of said law, to-wit: Chapter 46 of the Acts of the General Assembly of the State of Indiana, as aforesaid; that, said finding of said Public Service Commission was duly given, and said Certificate was duly issued in pursuance thereof.

And, plaintiff further says, that also, more than ninety (90) days prior to the taking effect of said Chapter 46 of the Acts of the General Assembly of the State of Indiana for the year 1925, as aforesaid, this plaintiff had been engaged in the operation of a motor vehicle, auto bus, as a common carrier of passengers for hire upon certain public highways in the State of Indiana, and within the City of Hammond in said State; and, that, on the 25th day of May, 1925, this plaintiff filed its petition with the Public Service Commission of Indiana for a Certificate of "Public Convenience and Necessity" to operate, and to continue to operate, said motor vehicle as a common carrier for hire over the public highways of the State of Indiana, in, and within, the City of Hammond, as aforesaid, in pursuance, and in accordance with the conditions and provisions of said Chapter 46 of the Acts of the General Assembly of the State of Indiana for the year 1925, as aforesaid.

And, plaintiff further says, that, thereafter, on the 26th day of June, 1925, said Public Service Commission approved

said petition, and granted to this plaintiff a Certificate of "Public Convenience and Necessity," authorizing this plaintiff to operate, and continue to operate and transport passengers for hire as a common carrier on the public highways of the State of Indiana, over the following route, to-wit:—
from Hammond, Indiana, to the Indiana-Illinois State
8 Line, and to use in such service, by this plaintiff, the
motor vehicles described in said petition, to-wit:—auto busses, owned and operated by this plaintiff; that, said Certificate of "Public Convenience and Necessity" was duly issued by said Public Service Commission, and ever since said 26th day of June, 1925, has been, and is now, and at all times since said date has been, in full force and effect; that, this plaintiff is now operating its said motor busses under, and in pursuance to, said Certificate of "Public Convenience and Necessity" over the public highways in, and within, the said City of Hammond, and from the City of Hammond, Indiana, to the Indiana-Illinois State Line, pursuant to said Certificate of "Public Convenience and Necessity," as aforesaid; that, said finding was duly given, and said Certificate duly granted by said Public Service Commission; that, each and all of said Certificates are now, and ever since the issuing thereof, have been, in full force and effect.

And, plaintiff further says, that, plaintiff employs as drivers of its said motor busses, competent, and efficient, and licensed chauffeurs, who drive and operate the same as the employees of this plaintiff; and, that, it has so employed such competent, and efficient, and licensed chauffeurs from the time of beginning of the operation of its busses, as aforesaid, to the present time, and is now so employing only such drivers and chauffeurs to operate said busses.

That, the City of Hammond is a municipal corporation with a present population of approximately sixty thousand (60,000) people; that, the City of East Chicago is a municipal corporation with a present population of approximately fifty thousand (50,000) people; that, contiguous to said City of Hammond and the City of East Chicago, is the City of Whiting, also in the State of Indiana, with a present population of approximately ten thousand (10,000) people; that, Calumet City, Illinois, is a municipal corporation, situated in the State of Illinois, with a present population of approximately fifteen thousand (15,000) people; that, the City of Chicago, Illinois, is a municipal corporation with an approximate pres-

ent population of at least three million (3,000,000) people; that, by reason of the aforesaid facts, a great amount of interstate traffic takes place daily between said cities; that, plaintiff established said bus line to meet the needs, and supply the needs of the traveling public to and from the Cities of Chicago and Calumet City, Illinois, and to and from the Cities of Hammond, East Chicago, and Whiting, Indiana; that, by reason of the operation of said bus line, as aforesaid, plaintiff has established a regular daily busi-
9 ness, which is profitable to plaintiff, and the number of passengers carried and conveyed by it is daily increasing, and the demand for continued service is daily increasing; that, prior to the beginning of the operation of said bus line by this plaintiff, no other person, or persons, were engaged in a similar line of business between said Cities except the Hammond, Whiting & East Chicago Street Railway Company, which Street Railway Company operated, and still operates, a line of street railway cars from South Park Avenue and 63rd Street in the City of Chicago to the Cities of Hammond, Whiting, and East Chicago, in the State of Indiana; that, said Street Railway Company operates its line of street cars over approximately the same streets and public highways as hereinabove alleged, and over which this plaintiff operates its line of motor bus transportation, as aforesaid; that, said Street Car Company has operated its said line of street cars over said streets, and between said points, for a period of more than twenty-five (25) years last past, and is still so operating the same, but by reason of its inadequate and inefficient equipment, provides an entirely inadequate service for the traveling public between said points, and requiring from an hour and a half to two hours' time to cover the same distance covered by plaintiff's said busses in forty (40) minutes; that, said Street Car Company delivers and discharges its passengers in the City of Hammond on said Hohman Street, near State Street, at approximately the same point where this plaintiff is accustomed to discharge the greatest number of its passengers coming from Chicago, Illinois, to Hammond, Indiana; and, likewise, said street car line discharges the greater number of its passengers in the City of Chicago at said South Park Avenue, and 63rd Street, at approximately the same point where plaintiff discharges the greater number of its passengers; that, in addition to carrying through passengers, however, from Chicago to Hammond, and from Hammond to Chicago, said street car line also car-

ries local passengers, thus doing both an intra-state and also an interstate business in the carrying of passengers.

That, since plaintiff began the operation of its bus line, as aforesaid, the Calumet Motor Coach Company, a corporation, has also began the operation of a bus line between the City of Hammond and the City of Chicago over, and upon, and along the same public highways as those used by plaintiff, and hereinabove described; that, said Calumet Motor Coach Company, also, in addition to carrying passengers to and from Hammond to Chicago and Chicago to Hammond, as aforesaid, also carries local passengers within the City of Hammond; thus, said Calumet Motor Coach Company does, and carries on, both a local or intra-state carrying of passengers as well as an interstate carrying of passengers, and said Calumet Motor Coach Company, in so doing, maintains and operates over said streets, as aforesaid, motor coaches and busses of approximately the same character and description as those used, and operated, and owned by this plaintiff; and, said Calumet Motor Coach Company, as aforesaid, discharges the greater number of its passengers, coming from Chicago to Hammond, on said Hohman Street in said City of Hammond near State Street, and in front of said Indiana Hotel, at approximately the same point where plaintiff discharges its passengers; and, likewise, in the City of Chicago, said Calumet Motor Coach Company discharges its passengers at 63rd Street and South Park Avenue in said City at approximately the same place where this plaintiff discharges its passengers.

That, ever since plaintiff began the operation of its bus line, as aforesaid, it has been its custom and practice to pick up and load passengers on Hohman Street, north of the intersection of State Street, in said City of Hammond, by stopping its busses on the easterly side of said Street, which point is within the business section of said City, and immediately across the street from said Indiana Hotel, which hotel is located on the westerly side of said Hohman Street at the intersection with said State Street in said City; that, to pick up and load the passengers at said point, required this plaintiff, in the operation of its busses, to stop the same at said point for a period of from two to five minutes; that, said Street Car Company, also, in operating its said street car line from Hammond to Chicago, as aforesaid, has, for a period of more than twenty-five (25) years, been accustomed to stop its street cars at said same point, and there pick up

and load its passengers for said trip to Chicago, and also to unload the same on its return trip at said point; that, plaintiff has not at any time stopped its busses at said point for a longer period than was necessary to pick up and load the passengers, who congregated at said point, seeking to take passage on plaintiff's busses to the City of Chicago; and, also, plaintiff has not stopped its busses in front of said Indiana Hotel longer than was absolutely necessary to unload and let off such passengers as wished to alight in front of said hotel, as their destination in said trip from Chicago to said City of Hammond, the approximate time of loading or unloading in each instance being about from two to three minutes, and not exceeding five minutes; that, plaintiff has at no time "parked" or permitted its busses to stop at said point except temporarily and momentarily for the purpose of loading and unloading passengers, and for no other purposes whatsoever; that, said points of stopping for loading and unloading passengers, as aforesaid, is upon the public street and public
11 highway in said City of Hammond at a point approximately one hundred (100′) feet north of the intersection of Hohman and State Streets in said City, two of the principal public streets in said City of Hammond.

Plaintiff further says, that, Calumet Motor Coach Company, since it began the operation of busses from Hammond to Chicago over said same streets used by plaintiff, as aforesaid, has also unloaded passengers on said Hohman Street, and picked up and loaded passengers on said Hohman Street at the self same points hereinabove described, and used by plaintiff, as aforesaid, and has done so daily, and is now doing so, without molestation, or prevention, from said defendant City of Hammond, its officers, agents, and employees; and, so likewise, is said Street Car Company so doing without hindrance or interference from said City of Hammond, its officers, agents, or employees; and, plaintiff says that it has at no time in any way interfered with either said Street Car Line or said Calumet Motor Coach Company in the operation of either said street cars or said busses so operated by said Street Car Company and Motor Coach Company, or any of their passengers or employees, or in any way interfered or hindered either said street car line or said Calumet Motor Coach Company in the unloading or loading and picking up of passengers, as aforesaid; that, plaintiff's schedule is so arranged as to the time of arrival and leaving of its motor busses to and from Chicago, that its said motor busses arrive

at said points for the discharge of passengers and for the picking up of passengers, at times different from the arrival of the busses so operated by said Calumet Motor Coach Company or the Street Cars operated by said Street Car Company, and this plaintiff in no way interferes with the operation of either said street cars or said Calumet Motor Coach Company busses in their several handling of, and carrying of passengers to and from the City of Hammond and the City of Chicago, as aforesaid.

But, plaintiff further says, that, beginning on May 8, A. D. 1925, the said City of Hammond, through its Police Department, undertook to prevent and prohibit plaintiff from loading and unloading passengers at said points on said Hohman Street near State Street, as aforesaid, notwithstanding that said Street Car Company and said Calumet Motor Coach Company were so doing without molestation or hindrance; and, said defendant City of Hammond, through its said police officers, on the 8th day of May, A. D. 1925, arrested each and every driver of plaintiff's motor busses, who, on arriving at Hammond, unloaded or loaded its passengers on said Hohman Street at the accustomed place, as aforesaid, charging the only offense against said employees of plaintiff as
12 being that of "loading passengers"; that, said City of Hammond, through its Police Department, also continued to arrest the employees of this plaintiff, operating its said motor busses, on the 9th day of May, 1925, and on the 10th day of May, 1925, and on the 11th day of May, 1925; in all, arresting approximately fifteen (15) of plaintiff's employees and drivers engaged in the operation of its said motor busses, and charging each with the same alleged offense, namely: "loading pasengers".

And, said defendant City of Hammond, through its said Mayor, Chief of Police, and police officers, threaten to continue the arresting of each and all of the employees of this plaintiff, and by such means threaten to prevent and prohibit this plaintiff from carrying on its business of interstate commerce in the carriage of passengers to and from the said cities aforesaid, by the means, and in the manner aforesaid, and said defendant, through its said Mayor, Chief of Police, and police officers, and Board of Public Works, still threaten to continue said arrests, and interference, and hindrance to plaintiff unless they are enjoined and prohibited from so doing.

And, plaintiff says, that, it is the primary purpose of said

defendant City to hinder and prohibit this plaintiff from carrying on its business of interstate commerce and prevent the carrying of passengers for hire, as aforesaid; that, said defendant City, as a municipal corporation, through its said officers, as aforesaid, has thus discriminated, and is discriminating, and is threatening to discriminate and prohibit entirely this plaintiff from carrying on its business, notwithstanding that at the same time and place, and over the same streets approximately, it permits, and has permitted, without hindrance or prohibition of any kind or character whatsoever, both said Street Car Company and said Calumet Motor Coach Company to carry on the same character of traffic in the carrying of passengers, as aforesaid, by the means which each of said companies provide.

That, said interference of, and by, said defendant City of Hammond, its Mayor, Chief of Police, and police officers, has now already greatly damaged plaintiff and plaintiff's business by reason of the arrest of its employees, as aforesaid, and has put plaintiff to, and has caused plaintiff, a great amount of expense and damage of at least Five Thousand ($5000.00) Dollars, by reason of loss of patrons and good will; and, if said defendant City is permitted to so continue, it will destroy plaintiff's business thus established by it, all to its great and irreparable injury; that, the effect of said interference of said defendant City with plaintiff, by the arrest of said employees and its threatened continuance thereof, is such as to obstruct and prohibit plaintiff
13 from the carrying on of interstate commerce in the carrying of passengers, for hire, as aforesaid, contrary to Section 8 of Article I of the United States Constitution, which provides, that:—

"The Congress shall have power * * * to regulate commerce * * * among the several states" etc.

And, plaintiff says, that, the actions and interference aforesaid of said defendant City of Hammond, through its Mayor, Chief of Police, and police officers, with plaintiff's business, as aforesaid, is in direct violation of said provision of the Unted States Constitution; and, that it is also in violation of the 14th Amendment to the United States Constitution, in that, it seeks to deprive plaintiff of its property without due process of law, and denies to plaintiff, and its patrons, the equal protection of the laws guaranteed by said 14th Amendment to the United States Constitution.

And, plaintiff further says, that, said highways, over which

plaintiff operates its said motor busses, are not unduly congested; that, they are so constructed that they can reasonably and without damage, carry much heavier burdens than those imposed by plaintiff's motor busses; that, the operation of plaintiff's motor busses impose no different or heavier burdens upon the highways over which plaintiff operates its said busses than is imposed by the operation of other vehicles of similar and of the same kind and character, by private persons and individuals, who use the same freely and daily without any hindrance or interference whatever from said defendant City of Hammond, or its officers; that, the nature and character of plaintiff's business is the carrying of passengers for hire, as aforesaid; that, the alleged charge, placed against the employees of plaintiff when arrested, to-wit:—"loading passengers", constitutes no offense against any law,—State, National, or Municipal, and constitutes no public offense of any kind or character whatsoever; but is, in fact, plaintiff says, a mere subterfuge and a groundless charge upon which defendant has caused the employees of this plaintiff to be unlawfully arrested in an effort to prohibit this plaintiff from carrying on its business, as aforesaid, and for the purpose of interfering with this plaintiff in the carrying on of its business, as aforesaid; all of which has been done by said defendant without any right or lawful purpose whatsoever; and, plaintiff says, that, said defendant will so continue to interfere with plaintiff, and the carrying on of plaintiff's business, unless said defendant is restrained and enjoined therefrom.

14 That, the action of said defendant City of Hammond, its officers, employees, and agents, in thus interfering with plaintiff's business, as aforesaid, is unreasonable and is purely arbitrary, and in violation of plaintiff's rights guaranteed to it by the provisions and amendments of the United States Constitution above referred to.

And, plaintiff further says, that, the public highways over which plaintiff operates its said motor busses, have existed continuously as such public highways for a period of more than fifty (50) years last past; and, during such period have been continuously used by the public generally without interference or hindrance, and each of said public highways are now so being used.

That, said defendant City of Hammond, a municipal corporation, its Mayor, Chief of Police, officers and agents, wrongfully and arbitrarily claim the right, notwithstanding

each and all of the aforesaid facts, to arbitrarily arrest plaintiff's said employees, and to prevent plaintiff from carrying on its business in the carrying of passengers for hire between said cities in the State of Illinois and the State of Indiana; and, unlawfully and wrongfully claim the right to prosecute, fine, and imprison plaintiff's said employees, so arrested, for loading and unloading plaintiff's passengers in the form and manner as hereinabove alleged; all of which claims, plaintiff says, are wholly unreasonable, unlawful, wrongful, and arbitrary; that, in truth, and in fact, said defendant City of Hammond, its officers, agents, and servants, are wholly without jurisdiction, power, and authority to in any manner interfere with, or hinder, or attempt to regulate plaintiff's business, the same being under the jurisdiction of said Public Service Commission of Indiana as to the carrying of passengers for hire, as aforesaid. Yet, nevertheless, plaintiff says that said defendant, its Mayor, Chief of Police, officers, and agents, are threatening to, and will continue to, arrest, imprison, fine, and prosecute plaintiff's said drivers and employees unless the said defendant, its Mayor, Chief of Police, officers, agents, and servants, are restrained and enjoined from so doing; all in violation of this plaintiff's rights as aforesaid; that, plaintiff is wholly without any adequate remedy at law, or in equity, save and except to bring this suit for an injunction against said defendant, its agents and employees, by reason of the premises.

Plaintiff further says, that, on the 23rd day of May, 1925, said defendant City of Hammond, by its City Council, passed a purported ordinance, pretending to be an ordinance of the City of Hammond, entitled: "Ordinance No. 1945. An Ordinance Regulating and Routing Certain Vehicles for Hire and Prohibiting Their Use of Certain Streets Within the City of Hammond"; that, said defendant City of Hammond, since the passage of said ordinance, now purports to be acting under said purported ordinance, and by reason of such ordinance purports to have the right to interfere with, and prohibit, plaintiff in, and from, the operation of, and carrying on its business, as described herein; that, said ordinance under which said defendant City now purports to act, is in words and figures following, to-wit:—

"No. 1945.

An Ordinance Regulating and Routing Certain Vehicles for Hire and Prohibiting Their Use of Certain Streets Within the City of Hammond.

Section 1. Be It Ordained by the Common Council of the City of Hammond, Indiana, that in order to promote public safety and order and to diminish the congestion of vehicular travel within said City, from and after the taking effect of this Ordinance, it shall be unlawful for any person, firm, or corporation owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon, or over any of the folowing parts of streets within said City of Hammond, to-wit:—

On Hohman Street from Russell Street to Michigan Avenue;

On State Street from Morton Court to Calumet Avenue;

On Sibley Street from the easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company where the same crosses Sibley Street westerly to Morton Court;

On Fayette Stret from Hohman Street to Oakley Avenue.

Section 2. From and after the taking effect of this Ordinance, it shall be unlawful for any person, firm, or corporation, owning or operating any motor vehicle carrying passengers for hire, to stop such vehicle for the purpose of receiving or discharging passengers upon any street, alley, or other public place within said City; provided, that the Board of Public Works may, for any period not exceeding six
16 months of successions thereof, permit such operation on any or all of the following designated parts of streets: Columbia Avenue between the South city limits and the right-of-way of the Michigan Central Railroad where the same crosses said Columbia Avenue; Sibley Street from Columbia Avenue to the Easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company; State Line Street from its Southerly terminus to its Northerly terminus at or near the right-of-way of said Michigan Central Railroad aforesaid; Rimbach Avenue from State Line Street to Ann Street; Ann Street from Rimbach Avenue to Russell Street; Russell Street from Ann Street to State Line Street, and for vehicles engaged strictly in interstate commerce any

street or other public place North of 122nd Street and East of Calumet Avenue.

Section 3. Whoever violates any of the provisions of Sections 1 and 2 of this Ordinance shall, upon conviction, be fined in any sum not exceeding Fifty ($50.00) Dollars for each and every offense, but nothing in this Ordinance shall be construed to impair the obligation of any contract to which the City is a party under which such motor vehicles are now operated for hire within said City. Nothing herein shall apply to taxicabs.

Section 4. This Ordinance shall supplement such ordinances as are now in force, and repeal only so much of them or any part thereof as may be in direct conflict herewith.

GEO. J. WOLF,
President.

Attest:
ARNOLD H. KUNERT,
City Clerk.

Submitted to the Mayor for his approval this 23 day of May, 1925.

Approved by me the 23 day of May, 1925.

DANIEL BROWN,
Mayor.

State of Indiana }
County of Lake } ss:

I, Arnold H. Kunert, City Clerk of the City of Hammond, Indiana, do hereby certify that the foregoing is a true,
17 complete, and correct copy of Ordinance No. 1945, entitled: "An Ordinance Regulating and Routing Certain Vehicles for Hire, and Prohibiting Their Use of Certain Streets Within the City of Hammond", which original Ordinance is now in my possession as such Clerk.

Witness my hand and seal of the City of Hammond this 10 day of June, 1925.

(Signed) ARNOLD H. KUNERT,
City Clerk.

(Seal of City of Hammond.)

(Signed) DANIEL BROWN,
Mayor.

But, plaintiff says, that, said purported Ordinance is illegal and void, in that it is unreasonable and beyond the power and

authority of said City of Hammond to adopt such an Ordinance; that, said ordinance is discriminatory, and unlawfully discriminates against this plaintiff, and attempts to give to other persons and citizens, or classes of citizens, privileges and immunities which, upon the same terms, are not granted to this plaintiff and to other citizens in like circumstances to the plaintiff; that, said ordinance attempts to control, and prohibit the usual and customary use of the streets of the City of Hammond by plaintiff, coming into the City of Hammond from outside the City of Hammond, to carry on its regular business and common business, as aforesaid, notwithstanding that said City of Hammond is wholly without power and authority to pass any such ordinance, or make any such conditions relating to the use of the public highways and streets of the City of Hammond by persons so coming into the City of Hammond from outside the City of Hammond; that, said ordinance is invalid and unreasonable, in that, it gives to the Board of Public Works of said City of Hammond an arbitrary power to discriminate against this plaintiff, by giving permission to some persons, and withholding the right from this plaintiff ,and others under similar conditions, to use the streets of the City of Hammond; that, said ordinance, by its very terms, discriminates in favor of those having alleged contracts with the City of Hammond; that, the sole and only purpose of said ordinance is to discriminate against this plaintiff, and in favor of said Calumet Motor Coach Company mentioned in plaintiff's complaint herein; that, said ordinance is unreasonable, unfair, and illegal, and is an undue restraint upon lawful trade and business; that, said ordinance provides no uniform conditions or rules by which the Board of Public Works should be guided in determining whether it will permit plaintiff and others to use the streets, and thereby gives to said Board of Public Works an arbitrary and
18 unwarranted power.

Plaintiff further says, that, said purported ordinance is also unreasonable, illegal, and void in this: that it purports to regulate and prohibit interstate commerce, and to prevent plaintiff from carrying on its business in the carrying of passengers for hire between the States of Indiana and Illinois; that, said ordinance discriminates against this plaintiff in the conduct of its business in carrying on interstate commerce, and is in direct violation of Section 8 of Article I of the United States Constitution, which provides that:—

"The Congress shall have power * * * to regulate

commerce with foreign nations, and among the several states, and with the Indian tribes."

That, notwithstanding the aforesaid provisions of the Federal Constitution, said defendant City is now purporting to act under said void and illegal ordinance, and, by means thereof, seeks, by arresting plaintiff's drivers and employees, to prevent and prohibit it from engaging in and carrying on interstate commerce in the carrying of passengers for hire, as aforesaid; which acts, plaintiff says, are illegal and void; and in direct violation of the law of the land, and deprives plaintiff of its property without due process of law, and abridges the privileges and immunities of plaintiff as guaranteed to it by the 14th Amendment to the United States Constitution, and denies to plaintiff the equal protection of the laws, and discriminates against plaintiff to its detriment and damage; all in violation of the United States Constitution and the Amendments thereof, and also in violation of Section 23 of Article I of the Indiana Constitution, which provides, that:—

"The General Assembly shall not grant to any citizen, or class of citizens, prvileges or immunities which, upon the same terms, shall not equally belong to all citizens."

That, plaintiff, in all respects, has complied with all reasonable and lawful requirements of the State of Indiana, and is authorized, as aforesaid, by Certificates of "Public Convenience and Necessity" to carry on said business in, and within, and through, and throughout the State of Indiana, all as aforesaid; yet, plaintiff says, that, said defendant City, purporting to act under said void ordinance, unless restrained and enjoined from so doing, will, by reason of its interference and arrests, and conduct, all as hereinabove described, prevent and prohibit plaintiff from carrying on its proper and lawful business, all to its great and irreparable damage.

19 And, plaintiff further says, that, purporting to act under said illegal and void ordinance, as aforesaid, said defendant City of Hammond, through its police officers, Mayor, and Chief of Police, has arrested plaintiff's employees, charging them with no other offense than simply stopping plaintiff's motor busses to pick up and let off passengers within the City of Hammond; and, said defendant is now threatening to, and will continue to, arrest plaintiff's employees unless they are restrained and enjoined from so doing.

That, said purported ordinance was passed by the City

Council of the City of Hammond at the request of said Calumet Motor Coach Company for the express purpose of discriminating against plaintiff, and for no other purpose; that, purporting to act under said ordinance, said defendant City of Hammond is now prohibiting and preventing this plaintiff from carrying on its business of interstate commerce in the carrying of passengers for hire, all as alleged in its complaint herein; that, unless said defendant is enjoined and restrained from so doing, it will entirely destroy the business of this plaintiff, notwithstanding that it now permits said Calumet Motor Coach Company, without hindrance or prohibition, to use each and all of the streets mentioned in said ordinance in carrying on its business, in carrying passengers for hire, and in carrying passengers to and from the City of Chicago to the City of Hammond, over the exact same route which plaintiff was using, and desires to use; and said defendant City, through its police officers, permits said Calumet Motor Coach Company to stop on each and all of said streets, claiming that said Calumet Motor Coach Company has a right to stop its busses, and to operate its busses, by reason of said purported ordinance, but that this plaintiff has no such right, notwithstanding that it is engaged in interstate commerce, all as alleged in its complaint herein; that, by such means, as aforesaid, said defendant City unlawfully discriminates against this plaintiff and denies to this plaintiff the equal protection of the laws of said State of Indiana, and of the United States of America; and, by such acts, as aforesaid, said defendant City grants and gives to other persons and citizens privileges and immunities which, upon the self same terms, it denies to this plaintiff,—all in violation of the Constitution of the State of Indiana and the Constitution of the United States of America, and its amendments; that, such acts of said defendant City are wholly illegal, arbitrary, and void; but, plaintiff says, that, it has no other means of redress in the premises except to bring this suit for an injunction against said defendant, enjoining said defendant, its agents, and officers, from continuing such unlawful and illegal acts against plaintiff and its employees.

20 Plaintiff further says, that, by reason of the unlawful and arbitrary acts of said defendant, as hereinabove alleged, in a further endeavor to operate and maintain its business in the carrying of passengers, in the conduct of interstate commerce, as aforesaid, and as outlined in its complaint herein, this plaintiff obtained the permission, license,

and right from the owner, to use a private strip of land in the City of Hammond owned by the Hammond Hotel & Improvement Company, located near the intersection of Plummer Avenue and Hohman Streets, giving intercommunication to each of said streets, but which land is owned in fee simple by said Hammond Hotel & Improvement Company, and which latter company gave its permission to this plaintiff to use said land as a place for the loading and unloading of passengers in said City of Hammond, wholly upon said land, and not within, or upon, any of the streets, alleys, or public places, of said City of Hammond; but plaintiff says, that: notwithstanding, said defendant City of Hammond has forbidden, and now continues, through its Mayor, Chief of Police, and police officers, to forbid this plaintiff to use said land, and threatened, and is now threatening, to arrest plaintiff's employees even if this plaintiff attempts to load and unload passengers upon said tract of land in which said defendant City of Hammond has no right, title, or interest whatsoever; and which land is owned in fee simple by said Hammond Hotel & Improvement Company, as aforesaid, and which company has given, and granted, permission to this plaintiff to so use said land; that, by each and all of the aforesaid acts, said defendant City of Hammond has entirely prevented and prohibited, and now threatens to entirely prevent and prohibit, this plaintiff from carrying on its business of interstate commerce in the carrying of passengers for hire between the City of Hammond and the City of Chicago and Calumet City, and East Chicago, all as aforesaid, and will continue so to prohibit and prevent this plaintiff from carrying on its said business, unless it is restrained and enjoined from so doing, and will, in such manner, completely destroy plaintiff's business, all to its irreparable damage and injury.

And, plaintiff says, that, the acts of said defendant City are wholly unlawful and void, and in direct violation of both the Federal Constitution and its Amendments, and the Indiana State Constitution,—all as hereinabove alleged.

And, plaintiff further says, that, said purported ordinance, under which said defendant City, its Mayor, Chief of Police, and officers, purport to act, is wholly unreasonable, illegal and void, and has been so held to be void by the City Court of the City of Hammond, which Court had full jurisdic-
21 tion to hear and determine said question, in this, to wit:

That, in accordance with the conduct of said defendant, as hereinabove alleged, on the 17th day of June, 1925, said

defendant City of Hammond, by its Chief of Police and police officers, upon the orders of the Mayor of said City, then and there arrested one Clarence E. Dome, an employee and driver of one of plaintiff's said auto busses, used in the carrying of passengers, in the conduct of interstate commerce, as aforesaid, carrying passengers for hire from and between the cities of Hammond, Indiana, and Chicago, Illinois, as aforesaid; and, in the City Court of the City of Hammond, a Court having exclusive jurisdiction to hear and try cases arising under alleged violation of the ordinances of said City of Hammond, brought and prosecuted a charge against said Clarence E. Dome, this plaintiff's employee and driver as aforesaid, upon the ground, and upon the express charge, that:

"He, the said Clarence E. Dome, did, on the 17th day of June, 1925, at and within the corporate limits of the City of Hammond, County of Lake, and State of Indiana, the said defendant being then and there engaged in the driving and operation, and had the sole control and management of a certain motor bus, and that said motor bus was then and there engaged in the transportation of passengers for hire; that, said motor vehicle was not being operated under any contract to which the City is a party, nor was said vehicle being operated as a taxicab; and, that Hohman Street is one of the principal business thoroughfares, extending in a northerly and southerly direction through the main business portion of Hammond; that, on the day and date aforesaid, defendant, while driving and operating the said motor bus, as aforesaid, did then and there unlawfully drive, propel, and run, and cause to be driven, propelled, and run, said motor vehicle over, upon, and across the said Hohman Street, and over, upon, and across that part thereof extending between Russell Street on the south and Michigan Avenue on the north, contrary to, and in violation of, Sections 1, 2, and 3 of Ordinance No. 1945 adopted by the Common Council of the City of Hammond on the 23rd day of May, 1925."

22 That, in said suit, so brought by said defendant City of Hammond in said City Court of Hammond against said Clarence E. Dome, one of the employees and drivers of this plaintiff, as aforesaid, the said defendant City of Hammond was then and there a party to said action, and the employee and driver of this plaintiff was then and there a party defendant to said action, being one of the many employees which said defendant has repeatedly arrested, and now continues to

threaten to arrest, and will continue to arrest and prosecute unless enjoined and restrained from so doing; that, said suit in said City Court was brought directly, and expressly, by said defendant City under, and upon, the express charge of the alleged violation of Sections 1, 2, and 3 of said alleged ordinance hereinabove set out, to-wit: said alleged ordinance No. 1945 adopted by the Common Council of said City of Hammond on the 23rd day of May, 1925, as aforesaid.

And, plaintiff further says, that, such steps were taken in said cause in said City Court of the City of Hammond, as aforesaid; that the validity of said alleged ordinance was put directly at issue on said alleged charge; that, upon the hearing and trial of said cause in said City Court of Hammond upon demurrer, and upon the merits of said cause, said City Court of Hammond duly held, and adjudged, that said purported Ordinance No. 1945, hereinabove set out, and under which said prosecution was brought, as aforesaid, by said defendant against said Clarence E. Dome, an employee and driver of this plaintiff, as aforesaid, was unreasonable, illegal, and void, as being in violation of the law of the land, and the Constitution of the State of Indiana; and, that, said purported ordinance was wholly void and of no effect whatsoever; that, said judgment of said City Court of the City of Hammond was duly given in said cause, and said City Court had full jurisdiction of both the subject matter and of the parties; that, the validity of said purported ordinance was directly put in issue therein, and was decided by said City Court of Hammond, as aforesaid; that, said judgment of said City Court of Hammond is and at all times since its rendition on the 27th day of June, A. D. 1925, as aforesaid, by said Court, has been, and still remains, in full force, and effect, and unappealed from; that by reason of each and all of the aforesaid facts, plaintiff says that said purported ordinance is, by the judicial construction of the City Court of the City of Hammond, the Court which has exclusive jurisdiction to hear and determine alleged violations of said ordinances, void, illegal, unreasonable, and of no effect whatsoever; and, that, said defendant City is thereby estopped and should be held to be thereby estopped, from further contending that it has a right to further attempt to prevent and prohibit this plaintiff from carrying on its lawful business in the conduct of interstate commerce, and the carrying of
23 passengers for hire, as aforesaid, under any of the provisions of said purported ordinance whatsoever; yet, not-

withstanding each and all of the aforesaid facts, plaintiff says, that, on the 8th day of July, 1925, said defendant City of Hammond did, through its Mayor, Chief of Police, and police officers, again arrest one Lansdowne, an employee and driver of one of the auto busses of this plaintiff for an alleged violation of the self same ordinance, and for the alleged offense of loading and unloading passengers within said City of Hammond, notwithstanding that he, the said Lansdowne, was then and there engaged, as an employee of this plaintiff, in the conduct of interstate commerce within the State of Indiana and the State of Illinois, in the carrying of passengers for hire from the said City of Hammond, in the State of Indiana, to the City of Chicago, in the State of Illinois, and not otherwise; and, that at the time of the arrest of the said Lansdowne, he, as such driver and employee of this plaintiff, was then and there upon said private strip of land, above described, and not upon any public street in said City of Hammond, or any public place of any kind or character whatsoever, but was then and there in charge of plaintiff's bus upon said private strip of ground, loading passengers preparatory to starting on a trip to Chicago, Illinois, in the carrying of said passengers, for hire, as aforesaid.

And, plaintiff further says, that, by such means said defendant prohibits and prevents plaintiff from carrying on its business in the carrying of passengers, for hire, as aforesaid; and each and every time plaintiff attempts to operate its said busses, and to carry on its business, said defendant arrests each and every driver, purporting to act under said ordinance aforesaid.

That, on the 22nd day of July, 1925, said defendant City, through its police officers, made a total of twenty-two (22) arrests of plaintiff's employees, purporting to arrest them under the said void ordinance as aforesaid, and charging them in each of said instances with the alleged offense of violating the city traffic law, to-wit: said alleged ordinance and the provisions thereof, in that, said employees were at the time of the alleged arrest driving, as such employees, an auto bus of plaintiff over Hohman Street, enroute to Chicago, Illinois, in the conduct of plaintiff's business, as aforesaid; that, said defendant claims and purports to claim that under said alleged ordinance plaintiff cannot drive its said busses over the streets of the City of Hammond, in carrying passengers over its several routes, as hereinabove described, notwithstanding each and all of the aforesaid facts, unless permis-

sion be given to plaintiff by the Board of Public Works of said City; and, said Board of Public Works of said City
24 has refused, and still refuses to give its permission to plaintiff to drive its said auto busses over said Hohman Street, and other streets of said City, as hereinabove alleged, notwithstanding that plaintiff has obtained the permit so to do from the Public Service Commission of Indiana, all as hereinabove alleged.

That on the 23rd day of July, 1925, after the great number of arrests of plaintiff's employees, as aforesaid, had been made, said City brought said cases to trial for the alleged violation of said purported ordinance, as aforesaid, in the City Court of Hammond, and said City Court on the hearing thereof, and after full hearing thereof, again adjudged, that, said ordinance was void, unreasonable, and of no effect whatsoever.

But plaintiff says, that, said defendant City of Hammond notwithstanding the many cases thus brought and decided in the City Court of Hammond, so holding said ordinance void, as aforesaid, and in which the validity of said ordinance was directly put in issue, refuses to refrain from arresting plaintiff's employees, and by such means entirely prevents plaintiff from carrying on its business in the carrying of passengers, for hire, as hereinabove alleged.

And, plaintiff further says, that, said Hohman Street is not unduly congested, and is the only direct route leading from plaintiff's private terminal aforesaid; that, plaintiff's auto busses do not cause, or impose, undue strain, or any unusual load, or burden, upon said Hohman Street, different from that continually traveling thereon by other auto busses and motor vehicles.

That, by the Certificates of "Convenience and Necessity" granted and issued to plaintiff by the Public Service Commission of Indiana, plaintiff has been granted express leave, and authority, and the right to operate its auto busses on, and upon said Hohman Street, as well as other streets in the City of Hammond, in the conduct of its business, as aforesaid. Yet, notwithstanding each and all of the aforesaid facts, said defendant City now threatens to continue to arrest, and will continue to arrest, each and all of the employees and drivers of this plaintiff, to the complete prevention and prohibition of this plaintiff from carrying on its business of interstate commerce, as aforesaid, and will prevent it entirely from carrying passengers for hire between said cities of Hammond

and Chicago, and Calumet City, and East Chicago, unless said defendant, its officers, agents, and employees, are restrained and enjoined from so doing; that, plaintiff has no other adequate remedy, either at law, or in equity, and unless defendant, its officers, agents, and employees, are enjoined and restrained from interfering with plaintiff in the conduct of its business, and from arresting and prohibiting its employees and drivers from proceeding with the conduct of plaintiff's business, plaintiff's said business will be entirely destroyed, to its great and irreparable damage.

Wherefore, plaintiff prays judgment that said defendant City of Hammond, its Mayor, Chief of Police, officers, agents, and servants, may be perpetually enjoined from in any wise interfering with, or preventing, or prohibiting, plaintiff from carrying on its said business, and from arresting, imprisoning, fining, and prosecuting plaintiff's drivers and employees while engaged in plaintiff's said business; and, that, a temporary injunction be issued pendente lite, enjoining said defendant City, its Mayor, Chief of Police, officers, agents, and servants, pending this suit, from in any way interfering with, molesting, or prohibiting plaintiff from carrying on its said business, and from arresting, imprisoning, fining, and prosecuting plaintiff, and plaintiff's employees and drivers, pending this suit; and, that, said alleged ordinance, under which said City purports to act, may be declared unreasonable, null, and void, and that plaintiff be protected from further interference by said defendant City, its Mayor, Chief of Police, officers, agents, and servants, in the conduct of its business, and in the carrying of passengers for hire, and in the carrying on of interstate commerce, all as alleged in plaintiff's complaint herein, and for all other proper and further relief to which plaintiff may be entitled in law and in equity.

W. J. Whinery,
Earl Barnes &
Fred Bates Johnson,
Attorneys for Plaintiff.

State of Indiana }
County of Lake } ss.

HENRY SCHAPPI and HENRY SCHAPPI, Jr., each being first duly sworn, upon oath say: that they are respectively the President and Secretary of the plaintiff, Schappi Bus Line, Incorporated, a corporation; that, they have read the foregoing complaint; that the facts set forth therein are

true, in substance, and in fact; and that the beliefs expressed therein are the true beliefs of each of them; that they make this separate and several affidavit for, and on behalf of, said plaintiff; and further affiants say not.

HENRY SCHAPPI,
HENRY SCHAPPI, JR.

Subscribed and sworn to before me this 28th day of July, A. D. 1925.

W. J. WHINERY,
Notary Public.

(Notarial Seal)

My notary commission expires: November 20, 1927.

27 (Endorsements on back of Complaint for Injunction:

* * * * * *

Original

Complaint for Injunction.

(Stamped:
Filed
Jul. 28, 1925
William P. Kappes, Clerk.

Clerk will please issue summons on within complaint for Defendant, returnable as required by law and the Rules of Court. W. J. Whinery, Atty. for Plaintiff.

28 And afterwards, to-wit: On the 6th day of August, A. D. 1925, before the Honorable Thomas W. Slick, one of the Judges of said Court, the following further proceedings were had and entered of record in this cause, to-wit:

* * * * * *

Comes now the plaintiff, Schappi Bus Line, Incorporated, a corporation, and files herein its motion for a preliminary injunction, which motion is in words and figures following, to-wit:

Aug. 6. 29 MOTION FOR A PRELIMINARY INJUNCTION, ETC.

* * * * * *

Now comes the plaintiff in the above entitled cause, the said Schappi Bus Line, Incorporated, by William J. Whinery and Earl Barnes, its solicitors, and move the Honorable Samuel Alschuler, in Chambers, at Hammond, Indiana, presiding as Judge of said Court in said cause, to grant a preliminary writ of injunction herein against said defendant, its agents, attorneys, servants and employees, pending this suit, and until the further order of this Court, conformable to the prayer of the bill of complaint filed in this cause.

(Signed) W. J. WHINERY & EARL BARNES,
Attorneys for Plaintiff.

30 (Endorsements on back of Motion for a Preliminary Injunction, etc.:

* * * * * *

Motion for a Preliminary Injunction, Etc.

Stamped:
Filed
Aug. 6, 1925
William P. Kappes, Clerk.

Wm. J. Whinery
Attorney and Counselor
Hammond, Ind.

Long Distance Tel. 269.

31 And afterwards, to-wit: On the 17th day of August, A. D. 1925, before the Honorable Thomas W. Slick, one of the Judges of said Court, the following further proceedings were had and entered of record in said cause, to-wit: Filed A 1925.

* * * * * *

Comes now the defendant, City of Hammond, a municipal corporation, and appears to plaintiff's complaint herein, and files answer to plaintiff's complaint herein, which answer is in words and figures following to wit:

32 PLAINTIFF'S EXHIBIT 2.

ANSWER.

* * * * * *

The defendant City of Hammond for answer to the Bill of Complaint herein, admits that the plaintiff is a corporation organized under the laws of the State of Illinois; that the defendant is a municipal corporation of the State of Indiana. Defendant admits that at the time of the filing of said Bill of Complaint, plaintiff was engaged in the business of carrying passengers as a common carrier between the City of Chicago in the State of Illinois, and the City of Hammond, Indiana; that as to whether plaintiff was engaged in local business in the State of Indiana, defendant is without knowledge. Defendant admits that plaintiff carried said passengers between Chicago, Illinois, and Hammond, Indiana, from a point in the public streets of the City of Chicago, Illinois, at or near South Park Avenue and 63rd Street, and that it hauled said passengers substantially along the route outlined and received and discharged them in the City of Hammond, Indiana, on Hohman Street, as alleged in said Bill of Complaint. Defendant is without knowledge as to whether any of the streets or highways in which said operation was carried on were constructed by Federal Aid. Defendant is without knowledge as to whether the route, so described, is the most direct, popular and serviceable one between said cities. Defendant is without knowledge as to the time schedules of the plaintiff's service as alleged in the Bill of Complaint, and without knowledge as to the rates of

fare. Defendant admits that the busses, so-called, used by the plaintiff are of a modern type. Defendant is without knowledge as to the number of people carried in said service by the plaintiff, and is without knowledge as to whether plaintiff has procured all necessary licenses, and complied with all laws or regulations as to the use of the streets and highways in the State of Indiana or elsewhere. Defend-
33 ant is without knowledge as to the date upon which plaintiff established its said service. Defendant is without knowledge as to the service alleged to be carried on between Calumet City, Illinois, and East Chicago, Indiana, by the plaintiff, or the number of people carried therein. Defendant is without knowledge as to the competency, efficiency and qualification of plaintiff's drivers or chauffeurs.

Defendant admits the allegations in the Bill as to the population of the various cities mentioned therein, and the existence of a large amount of interstate traffic among them. Defendant denies the need or necessity of the operation of the plaintiff between or among said cities, and is without knowledge as to whether said operation is profitable or the demand increasing. Defendant admits the existence and operation of the Hammond, Whiting & East Chicago Street Railway, as alleged in the Bill, except as to the adequacy of its service and efficiency of its equipment and its time schedules. Defendant admits the existence and operation of Calumet Motor Coach Company and its service in said City of Hammond. Defendants admits that plaintiff has been receiving and discharging passengers on Hohman Street in said City, as alleged in the Bill. Defendant denies that plaintiff has stopped not to exceed five minutes for receiving such passengers, but says that on the contrary, such stops have been as long as ten or fifteen minutes in said City, and denies that said busses have stopped only temporarily and momentarily.

Defendant admits that through its Police Department it has undertaken to prevent and prohibit plaintiff from loading and unloading passengers in said Hohman Street, and that it will continue so to do, unless prevented by lawful authority.

Defendant denies that its primarily purpose is to hinder and prevent plaintiff from carrying on interstate commerce and carrying passengers for hire, and asserts that on the contrary, its action is a reasonable regulation conducive to public safety and order, and denies that its interference has

caused great damage and loss to the plaintiff, and denies that its action will destroy plaintiff's business, and denies that its conduct is in any sense a violation of rights guaranteed under the Constitution or laws of the United States, and denies that the highways mentioned in said Bill are not unduly congested, but on the contrary, asserts that there is great and confusing congestion at and about said corner of State and Hohman Streets in said City, and the places where plaintiff has received and discharged passengers heretofore in said Hohman Street; that whatever may be the entry on the police records of said City concerning the offenses charged against plaintiff and its employes, they are and will be prosecuted under said Ordinance No. 1945.

34 Defendant denies that its conduct destroys interstate commerce, but on the contrary says that there are other usable and convenient avenues open to the passage of plaintiff's motor vehicles in said through said defendant City.

Defendant is without knowledge as to the insurance carried by the plaintiff, as alleged in the Bill.

Defendant further says that it has appealed to the Lake Superior Court from the orders of the Public Service Commission mentioned in said Bill of Complaint, granting to the plaintiff herein the certificates of convenience and necessity mentioned in said Bill of Complaint; that said certificates and the permits issued or implied thereby are of no valadity, force or effect whatsoever without permission from the City of Hammond; that said permits are of no virtue for the further reason that they are an attempt to regulate interstate commerce.

Defendant further admits the passage of Ordinance #1945 mentioned in said Bill of Complaint and says that it is attempting to enforce the same according to its letter and spirit.

Defendant denies that it is arresting or attempting to arrest plaintiff's drivers for being on the strip of land alleged to be a private terminal near the intersection of Plummer Avenue and Hohman Street in said City and does not threaten to arrest, and will not arrest, such employes nor interfere with the plaintiff in any sense in unloading or loading passengers on such ground unless and until the question of whether or not it is a public street has been determined.

Defendant denies that the hearing of one Clarence E. Dome in the City Court of Hammond was upon the merits of the

cause and says that it was only upon the demurrer to the complaint.

Defendant denies that one Lansdowne mentioned in the Bill of Complaint was arrested for being on said so-called private terminal.

Defendant denies the allegation in said Bill of Complaint that Hohman Street, where the plaintiff is forbidden to be, is not unduly congested and that plaintiff's auto busses do not cause or impose undue strain or unusual load or burden on said street.

Defendant further alleges as a second distinct and separate defense to said Bill that said Bill is insufficient for want of equity.

35 Defendant further alleges that as a third distinct and separate defense to said Bill that the same is not sufficient in law.

Wherefore, defendant prays that said Bill be dismissed with costs.

(Signed) McMahon & Conroy,
Solicitors for Defendant.

36 (Endorsements on back of Answer:

Answer.

(Stamped:
Filed
Aug. 17, 1925
William P. Kappes, Clerk

Bomberger, Peters & Morthland
200 Ruff Building, Hammond, Ind.
Attorneys for Defendant.

37 And afterwards, to-wit: On the 14th day of September, A. D. 1925, before the Honorable Thomas W. Slick, one of the Judges of said Court, in Chambers, at South Bend, Indiana, in said District, the following further proceedings were had and entered of record in the above entitled cause, to-wit:

* * * * * *

Comes now the parties, plaintiff and defendant, by their respective attorneys, and the plaintiff shows to the said Judge of said Court, in Chambers, that it has given written notice of the filing of its motion for a preliminary injunction in this cause, and the defendant appears to said notice and motion, and said cause is thereupon submitted to the Judge of said Court, in Chambers in said District, upon the plaintiff's said motion for a preliminary injunction, and the plaintiff offered evidence in support of its said motion, and rested.

38 And thereupon the defendant likewise introduced evidence in opposition to said motion, and rested.

And thereupon the plaintiff offered additional evidence in rebuttal, and in support of said motion, and rested.

And this was all the evidence introduced by the parties upon said hearing, and the hour of adjournment having arrived, the hearing of said cause on said motion for a preliminary injunction, before the said Judge of said Court, was continued until the following day, namely: September 15, A. D. 1925 at ten (10:00) o'clock a. m.

42 And afterwards, to-wit: On the 15 day of October, A. D. 1925, before the Honorable Thomas W. Slick, one of the Judges of said Court, the following further proceedings were had and entered of record in said cause, to-wit:

* * * * * *

Comes now the plaintiff in the above entitled cause and files in the office of the Clerk of said United States District Court, for the District of Indiana, its Bill of Exceptions containing the evidence given on the hearing upon plaintiff's motion for a preliminary injunction in said cause, after the said Bill of Exceptions had been duly approved and signed by the Honorable Thomas W. Slick, one of the Judges of said Court, presiding in said cause, and which said Bill of Exceptions is in words and figures following, to-wit:

of excep-
ns, filed
t. 15, 1925.

43 BILL OF EXCEPTIONS.

* * * * * *

Be It Remembered, That, on the hearing of said cause on the motion of plaintiff for a preliminary injunction in said cause, before the Honorable Thomas W. Slick, one of the Judges of said Court, in Chambers, presiding in said cause, on the 14th day of September, A. D. 1925, in Chambers as aforesaid, the following proceedings were had, and the following evidence was introduced and heard by said Judge of said Court in Chambers on said hearing, to-wit:

The Plaintiff, to sustain the issues and support said motion upon its part, offered and introduced in evidence in its case in chief, the following evidence, to-wit:

44 (1) The verified complaint, filed in this cause in this Court by the plaintiff on the 28th day of July, 1925, in the Clerk's office of said court at Hammond, Indiana, which said verified complaint was marked as "Plaintiff's Exhibit 1," was introduced and read in evidence, being the same identical complaint and document as plaintiff's verified complaint set forth in the transcript of the record in this cause as prepared by the Clerk of said Court, as having been filed in the Clerk's office of this Court at Hammond, Indiana, on the 28th day of July, 1925, as aforesaid, and which said verified complaint, so marked as "Plaintiff's Exhibit 1" as aforesaid, is hereby made a part of this Bill of Exceptions by reference to avoid repetition, the same as if fully incorporated and copied in this Bill of Exceptions. This reference is inserted with the intention of incorporating said verfied complaint, marked "Plaintiff's Exhibit 1," in this Bill of Exceptions by reference as provided in Rule 10, Clause 3, of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit; but which said verified complaint shall be considered as evidence introduced by the plaintiff in this cause the same as though copied in full in this Bill of Exceptions.

(2) Defendant's answer, filed in this cause in this Court by the defendant on the 17th day of August, 1925, in the Clerk's office of said Court at Hammond, Indiana, which said answer was marked as "Plaintiff's Exhibit 2," was introduced and read in evidence, being the same identical an-

45 swer as defendant's answer set forth in the transcript of the record in this cause as prepared by the Clerk of

said Court, as having been filed in the Clerk's office of this Court at Hammond, Indiana, on the 17th day of August, 1925 as aforesaid, and which said answer, so marked as "Plaintiff's Exhibit 2" as aforesaid, is hereby made a part of this Bill of Exceptions by reference to avoid repetition, the same as if fully incorporated and copied in this Bill of Exceptions. This reference is inserted with the intention of incorporating said answer, marked "Plaintiff's Exhibit 2" in the Bill of Exceptions by reference, as provided in Rule 10, Clause 3, of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit; but which said answer shall be considered as evidence introduced by the plaintiff in this cause, the same as though copied in full in this Bill of Exceptions.

(3) "Plaintiff's Exhibit 3," being a Certificate of Public Convenience and Necessity Number 324-M, issued to plaintiff by the Public Service Commission of Indiana on the 26th day of June, 1925, to which offered evidence the defendant objected on the ground that the City of Hammond is a city operating under a franchise, or the color of a franchise, within the proviso of Section 5 of the Motor Vehicle Act of 1925, Chapter 46, Acts of 1925, but which objection was, by the Judge of said Court, overruled, and defendant excepted, and said offered evidence was admitted and read in evidence, and is in words and figures following, to-wit:

46 "PLAINTIFF'S EXHIBIT 3."

BEFORE THE PUBLIC SERVICE COMMISSION OF INDIANA.

In the Matter of the Application of Schappi Bus Line, Inc. for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles as a Common Carrier.	No. 324 M.

Artman, Commissioner:

On May 25, 1925 Schappi Bus Line, Incorporated, of Calumet City, Illinois, filed with the Public Service Commission of Indiana in the above entitled cause, a verified ninety day application for a certificate of public convenience and necessity for the operation by the applicant of motor vehicles as a common carrier of passengers only upon certain public high-

ways of the state. It is alleged in said application that the applicant had operated motor vehicles as a common carrier of passengers upon certain public highways of the state over the route therein described with a substantially regular schedule for a period of ninety days immediately prior to the taking effect of Chapter 46 of the Acts of the General Assembly of the State of Indiana for 1925, and that the applicant was engaged in such operation at the time of filing such application. The applicants submitted verified written proof of the allegations of such petition. The Public Service Commission having examined and considered the evidence submitted, and being thereby duly advised in the premises, finds that the material averments of the application are true. The Commission further finds that the applicant for the period of time hereinbefore designated has been the owner and operator of a motor vehicle common carrier service for the transportation of passengers from Calumet City, Illinois to Hammond, Indiana. That in the operation of said service the applicant has been, and is, engaged in both inter-state and intra-state carriage of passengers as a common carrier. That in the transportation of intra-state passengers the applicant will operate over the public highways from Hammond to the state line, passing through and serving intermediate territory. The Commission finds that the prayer of the petition should be granted, and that a certificate of public convenience and necessity should be issued to the applicant, authorizing it to continue the transportation of intra-state passengers as a common carrier over the aforesaid route upon the public
47 highways of the state from Hammond, Indiana to the Indiana-Illinois state line, upon the filing with the Commission by the applicant of a policy of insurance executed by a company legally authorized to execute such instruments in the state of Indiana, guaranteeing the payment of all damages which may result on account of personal injuries or property damage other than to property designated as cargo from any and all accidents due to negligence in the use or operation of any motor vehicle under such certificate, and the indemnities therein to be equal to the following schedule, to-wit:

On each motor vehicle used for the transportation of passengers the insurer shall be liable to each person suffering damages on account of personal injuries or property damage other than to property designated as cargo as the result of any accident due to the negligence of the insured, his agents,

employes, or representatives, in the use or operation of such motor vehicle to the extent of the damages sustained thereby, not exceeding $5000, and subject to the same limit the total liability of the insurer therefor on account of any one accident shall not exceed $50,000.

On the 25th day of May, 1925, said applicant filed with the Public Service Commission of Indiana its Policy of Insurance No. 738660, executed by the Hartford Accident and Indemnity Company of Hartford, Conn., containing insurance indemnities equal to those set out in the foregoing schedule. Said policy of insurance was on said date approved by the Public Service Commission of Indiana.

It Is Therefore Ordered by the Public Service Commission of Indiana, that a certificate of public convenience and necessity be issued to the applicant Schappi Bus Line, Inc., authorizing it to continue to transport passengers only as a common carrier upon the public highways of the state over the following route:

From Hammon, Indiana to the Indiana-Illinois state line, and to use in such service the motor vehicles described in the application and such other motor vehicles as may be lawfully operated thereunder as additional, replacement, or emergency equipment under any order or rule of the Public Service Commission of Indiana. The application herein, all exhibits and affidavits attached thereto are hereby made a part of this order.

All of which is hereby finally ordered by the Public Service Commission of Indiana this 26th day of June, 1925.

48 PUBLIC SERVICE COMMISSION OF INDIANA
(Signed) J. W. McCARDLE,
Chairman.

Attest:
HOWELL ELLIS,
Secretary.
(Seal)

49 Certificate of Public Convenience and Necessity
Motor Vehicle Form
No. 9.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA

In the Matter of the application of Schappi Bus Line, Inc.,——— for a certificate of public convenience and necessity to operate motor vehicles as a common carrier.	Application No. 324 M. Certificate No. 324 M.

Certificate of Public Convenience and Necessity.

The Public Service Commission of Indiana hereby certifies that, after an investigation and hearing upon the above entitled application, an order was made and entered by it, which is made a part hereof, whereby it found and ordered that said application be granted and that a certificate of public convenience and necessity be issued to said applicant, and this certificate is now issued to Schappi Bus Line, Inc.,——— certifying that public convenience and necessity require the operation of the motor vehicles described in said order upon the route, time schedule and rates set forth in the aforesaid application and order as provided in Chapter 46 of the Acts of the General Assembly of the State of Indiana for the year 1925. This certificate shall cover any and all other motor vehicles which the holder may be authorized to operate under any order or rule of the Public Service Commission of Indiana, either as additional, special, substitute, replacement or emergency equipment.

In testimony whereof the Public Service Commission of Indiana has caused this certificate to be signed by its Chairman and attested by its Secretary, this 26th day of June, 1925.

PUBLIC SERVICE COMMISSION OF INDIANA
(Signed) J. W. MCCARDLE,
Chairman.

Attest:
HOWELL ELLIS,
Secretary.
(Seal)

50 (4). "Plaintiff's Exhibit 4", being a Certificate of Public Convenience and Necessity Number 325-M, issued to plaintiff by the Public Service Commission of Indiana on the 24th day of July, 1925, to which offered evidence the defendant objected on the ground that the City of Hammond is a city operating under a franchise, or the color of a franchise, within the proviso of Section 5 of the Motor Vehicle Act of 1925, Chapter 46, Acts of 1925, but which objection was, by the Judge of said Court, overruled, and defendant excepted, and said offered evidence was admitted and read in evidence, and is in words an figures following, to-wit:—

51 "PLAINTIFF'S EXHIBIT 4."

STATE OF INDIANA

THE PUBLIC SERVICE COMMISSION

Beginning Passenger

In the Matter of the Application of Schappi Bus Line, Incorporated, of Calumet City, Illinois, for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles as a Common Carrier from Hammond, Indiana, to Indiana State Line and Continue to Sixty-third Street and Park Avenue, Chicago, Illinois.	No. 325-M

Appearances:

For applicant—Fred B. Johnson.

For protestants—W. W. McMahon, City Attorney, and Bomberger, Peters & Morthland for City of Hammond; Crumpacker & Friedrich, of Hammond, and Harrison & Buskirk, of Indianapolis, for the Chicago, South Shore & South Bend Railway Company and the Hammond, Whiting & East Chicago Railway Company.

Singleton, Commissioner:

On May 25, 1925, applicant filed with the Public Service Commission of Indiana a written, verified application for cer-

tificate of public convenience and necessity to operate as a motor vehicle common carrier, for passenger service only, from Hammond, Indiana, to Chicago, Illinois. Only interstate business was sought. Passengers accepted in Indiana were not to be discharged in Indiana, but taken to Chicago in the State of Illinois. "This is an interstate operation," the application stated.

Policy of insurance No. A. L. P. 738,660, issued by the Hartford Accident & Indemnity Company, of Hartford Con-
52 necticut, was filed with the application.

On June 6, 1925, a hearing was held in the rooms of the Commission at Indianapolis, at which time the City of Hammond presented motion to dismiss for lack of jurisdiction. Applicant's counsel agreed that the motion should be sustained. Some discussion was indulged to clarify the issues, and the applicant gave oral testimony, under oath, to clarify the terms of the application. Applicant stated that he had operated from April 11, 1925, to June 11, 1925, at which time he discontinued the service because an Ordinance was approved by the City of Hammond preventing him from using certain streets in said city. However, applicant wished to continue the prosecution of his case, as evidenced by the presence of himself and witnesses at the hearing and as evidenced by letter from his local counsel in Hammond. Said attorney, W. J. Whinery, urged that certificate should be granted in this case as in cause No. 324-M. This contention lacks similarity in issue as applicant, in 324-M did intra-state business, while the same applicant in the instant case does purely interstate business.

Crumpacker & Friedrich, attorneys, representing the Chicago, South Shore & South Bend and the Hammond, Whiting & East Chicago railway companies, as protestants at the hearing, submitted brief after the hearing in which they urged in behalf of the latter company as follows:

"If, however, the Commission shall conclude that the matter is one wholly of interstate commerce and that the Commission is, therefore, without jurisdiction to deny said company the right to operate, protestant desires to call to the attention of the Commission its duty to take jurisdiction of said cause for the purpose of protecting the citizens of the State of Indiana against damages which may be caused by the said applicant in operating its busses within this state. Even if the operation proposed is one in interstate commerce only, the Commission may and should require the said carrier

to take out and maintain policies of insurance to the same extent as intrastate carriers.

"Congress has not yet enacted any legislation looking to the protection of the general public from injuries caused by motor busses operating in interstate commerce. Until Congress does so, the jurisdiction to protect their citizens remains in the governments of the respective states. It is well settled that until federal legislation is enacted on the subject,
53 interstate carriers are subject to state regulation with respect to the answering of claims for damages caused by them, and with respect to other safety and police measures adopted for the protection of the general public."

This touches the real question in this application.

In the United States Supreme Court, *A. J. Buck* v. *E. V. Kuykendall,* appealed from decree of the Federal Court for the Western District of the State of Washington. The Supreme Court held unconstitutional a state law construed by state authorities to deny the use of highways in Washington state, though preventing interstate operation. Commenting, the court said:

"Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause."

George W. Bush & Sons Company v. *Wm. M. Maloy, et al.,* appealed to the United States Supreme Court from the application of the motor vehicle law of the State of Maryland by the Public Service Commission of Maryland, in which application for certificate to transact purely interstate business was denied by the Maryland Commission. The Maryland Commission was reversed, and the following comment by the court connected the Buck case and the Bush case:

"The state action in the Buck case was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the Commerce Clause for Federal regulation Reversed."

It is obvious that the Public Service Commission of Indiana has not jurisdiction to deny the use of Indiana highways to an interstate common carrier.

Chapter 46, Acts of the General Assembly of Indiana, 1925, requires all motor vehicle common carriers that fall within

the jurisdiction of the Public Service Commission of Indiana to file with said Commission "a bond, indemnity undertaking on policy of insurance * * * guaranteeing the payment of all damages which may result from any and all accidents due to negligence in the use or operation of such motor vehicle, which bond, indemnity undertaking or policy
54 * * * shall be in such amount as shall be fixed by such Commission at the time of granting a certificate of convenience and necessity for the operation of such motor vehicle."

Obviously the legislature intended that all persons and all property should receive the protection provided above while within or upon any motor vehicle common carrier authorized by this Commission to operate upon the highways of Indiana. It is fair and reasonable to assume that all citizens of Indiana should have equal protection of all its laws.

Section 5 of Chapter 46, supra, in the proviso of said section, excepts from the jurisdiction of this Commission motor vehicle common carriers that operate in certain cities or towns within the state. The exception is:

"That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the supreme court."

This proviso was intended to retain within the jurisdiction of certain cities the motor vehicle common carrier operation existing at the time of the enactment of Chapter 46, which operation was then under the jurisdiction of said cities "under, or by color of, a contract." The City of Hammond was and is one of such cities. The act (Section 5) designates the jurisdiction of said cities as being "in any city or town of this state * * * and in cities and towns contiguous thereto." It would not be reasonable to assume that the legislature contemplated interstate operation in its expression. For the sake of harmonious operation of the law and

for the sake of granting all the rights that said cities could claim by the terms of ordinances or contracts in existence, "cities and towns contiguous thereto" were embodied in the exception.

Exceptions to a general statute must be construed
55 strictly. It is a fact that in the operation of this applicant's motor vehicle line his operation is strictly interstate; that the only "contiguous" city touched in this operation is the City of Chicago in the state of Illinois. A fair and reasonable construction of the proviso in Section 5 is to ascribe to it the intent that such cities should be limited in their control and that the limitation should be to operation within such cities and within cities and towns contiguous thereto, within the state. Applicant's operation is not within the City of Hammond, within the intent of Section 5, as this Commission believes.

The Commission finds, therefore, that the City of Hammond is without jurisdiction to grant or deny this applicant the right of interstate operation; that the Public Service Commission of Indiana is without authority to deny this applicant the right within this state over interstate operation; that the citizens of Indiana who patronize this applicant are entitled to the equal protection of the provisions in Chapter 46, Acts of 1925, with the citizens of Indiana who patronize intrastate motor vehicle common carriers; that the insurance features of Chapter 46 are aplicable only through, by and at the time of granting a certificate of convenience and necessity by this Commission; that such certificate should issue to the Schappi Bus Line, Incorporated, and it will be so ordered.

It Is, Therefore, Ordered By The Public Service Commission of Indiana, that the Policy of Insurance filed with this application and the schedule, fares, description of motor vehicles and route to the Indiana-Illinois state line be and the same are hereby approved; that a certificate of public convenience and necessity issue to the Schappi Bus Line, Incorporated, to the Indiana-Illinois state line as an interstate common carrier.

Approved by the Public Service Commission of Indiana this 24th day of July, 1925.

(Signed) J. W. McCardle,
Chairman.

(Seal)

Attest:

Howell Ellis,
Secretary.

56 Certificate of Public Convenience and Necessity
Motor Vehicle Form
No. 9.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA.

In the Matter of the application of Schappi Bus Line, Inc., ——— for a certificate of public convenience and necessity to operate motor vehicles as a common carrier.	Application No. 325-M Certificate No. .....

Certificate of Public Convenience and Necessity.

The Public Service Commission of Indiana hereby certifies that, after an investigation and hearing upon the above entitled application, an order was made and entered by it, which is made a part heerof, whereby it found and ordered that said application be granted and that a certificate of public convenience and necessity be issued to said applicant, and this certificate is now issued to Schappi Bus Line, Inc., certifying that public convenience and necessity require the operation of the motor vehicles described in said order upon the route, time schedule and rates set forth in the aforesaid application and order as provided in Chapter 46 of the Acts of the General Assembly of the State of Indiana for the year 1925. This certificate shall cover any and all other motor vehicles which the holder may be authorized to operate under any order or rule of the Public Service Commission of Indiana, either as additional, special, substitute, replacement or emergency equipment.

In testimony whereof the Public Service Commission of Indiana has caused this certificate to be signed by its Chairman and attested by its Secretary, this 24th day of July, 1925.

PUBLIC SERVICE COMMISSION OF INDANA
(Signed) J. W. MCCARDLE,
Chairman.

(Seal)
Attest:
HOWELL ELLIS,
Secretary.

57 (5). "Plaintiff's Exhibit 5", being a certificate of Public Convenience and Necessity Number 326-M, issued

to plaintiff by the Public Service Commission of Indiana on the 5th day of June, 1925, to which offered evidence the defendant objected on the ground that the City of Hammond is a city operating under a franchise, or the color of a franchise, within the proviso of Section 5 of the Motor Vehicle Act of 1925, Chapter 46, Acts of 1925, but which objection was, by the Judge of said Court, overruled, and defendant excepted, and said offered evidence was admitted and read in evidence, and is in words and figures following, to-wit:—

58 "PLAINTIFF'S EXHIBIT 5."

THE PUBLIC SERVICE COMMISSION OF INDIANA

90-Day Operator
Order Granting Certificate of Public Convenience
and Necessity
Motor Vehicle Form No. 8

In the Matter of the Application of Schappi Bus Line, Inc., for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles as a Common Carrier	No. 326-M

Artman, Commissioner:

On May 25, 1925, the Schappi Bus Line, Inc., of Calumet City, Illinois, filed with the Public Service Commission of Indiana, in the above entitled cause, a verified ninety-day application for certificate of public convenience and necessity for the operation by the applicant of motor vehicles as a common carrier of passengers only upon certain public highways of the State of Indiana.

It is alleged in said application that the applicant had operated motor vehicles as a common carrier of passengers upon certain public highways of the state over the route described therein, with a substantially regular schedule, for a period of ninety days immediately prior to the taking effect of Chapter 46 of the Acts of the General Assembly of the State of Indiana for 1925, and that the applicant was engaged in such operation at the time of filing such application.

The applicant submitted verified written proof of the allegations of such petition. The Public Service Commission,

having examined and considered the evidence submitted and being thereby duly advised in the premises, finds that the material averments of the application are true, that the prayer thereof should be granted and a certificate of public convenience and necessity issued to the applicant, and it will be so ordered upon the filing with the Commission by the applicant of a policy of insurance executed by a company legally authorized to execute such instruments in the State of Indiana, guaranteeing the payment of all damages which
59 may result on account of personal injuries or property damage other than to property designated as cargo from any and all accidents due to negligence in the use or operation of any motor vehicle under such certificate and the indemnities therein to be equal to the following schedule, to-wit:—

On each motor vehicle used for the transportation of passengers the insurer shall be liable to each person suffering damages on account of personal injuries or property damages, other than to property designated as cargo, as the result of any accident due to the negligence of the insured, his agents, employes or representatives, in the use or operation of such motor vehicle to the extent of the damages sustained thereby, not exceeding $5000 and, subject to the same limit, the total liability of the insurer therefor on account of any one accident shall not exceed $50,000.

Now, on the 25th day of May, 1925, the applicant filed with the Public Service Commission of Indiana its policy of insurance No. A. L. P. 738660, executed by the Hartford Accident and Indemnity Company of Hartford, Connecticut, containing insurance indemnities equal to those set out in the foregoing schedule, and said policy is now on the 25th day of May, 1925, approved by the Public Service Commission of Indiana.

It Is Therefore Ordered by the Public Service Commission of Indiana, that a certificate of public convenience and necessity be issued to the applicant, Schappi Bus Line, Inc., authorizing it to continue to transport passengers only as a common carrier upon the public highways of the state over the following route, to-wit: From Hammond, Indiana, to East Chicago, Indiana; and to use in such transportation the motor vehicles described in the application and such other motor vehicles as may be lawfully operated thereunder as additional, replacement or emergency equipment under any order or rule of the Public Service Commission of Indiana.

The application herein and all exhibits and affidavits attached thereto are hereby made a part of this order—all of which is hereby finally ordered by the Public Service Commision of Indiana this 5th day of June, 1925.

PUBLIC SERVICE COMMISSION OF INDIANA,
(Signed) J. W. McCARDLE,
Chairman.

(Seal)
Attest:
HOWELL ELLIS,
Secretary.

60 Certificate of Public Convenience and Necessity
Motor Vehicle Form
No. 9.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA

In the Matter of the application of Schappi Bus Line, Inc. ——— for a certificate of public convenience and necessity to operate motor vehicles as a common carrier.	Application No. 326-M Certificate No. .....

Certificate of Public Convenience and Necessity.

The Public Service Commission of Indiana hereby certifies that, after an investigation and hearing upon the above entitled application, an order was made and entered by it, which is made a part hereof, whereby it found and ordered that said application be granted and that a certificate of public convenience and necessity be issued to said applicant, and this certificate is now issued to Schappi Bus Line, Inc., Calumet City, Illinois, certifying that public convenience and necessity require the operation of the motor vehicles described in said order upon the route, time schedule and rates set forth in the aforesaid application and order as provided in Chapter 46 of the Acts of the General Assembly of the State of Indiana for the year 1925. This certificate shall cover any and all other motor vehicles which the holder may be authorized to operate under any order or rule of the Public Service Commission of Indiana, either as additional, special, substitute, replacement or emergency equipment.

In testimony whereof the Public Service Commission of

Indiana has caused this certificate to be signed by its Chairman and attested by its Secretary this 5th day of June, 1925.

PUBLIC SERVICE COMMISSION OF INDIANA,
(Signed) J. W. McCARDLE,
Chairman.

(Seal)

Attest:

HOWELL ELLIS,
Secretary.

61 (6). "Plaintiff's Exhibit 6", being a Certificate of Public Convenience and Necessity Number 327-M, issued to plaintiff by the Public Service Commission of Indiana on the 3rd day of July, 1925, to which offered evidence the defendant objected on the ground that the City of Hammond is a city operating under a franchise, or the color of a franchise, within the proviso of Section 5 of the Motor Vehicle Act of 1925, Chapter 46, Acts of 1925, but which objection was, by the Judge of said Court, overruled, and defendant excepted, and said offered evidence was admitted and read in evidence, and is in words and figures following, to-wit:—

62 "PLAINTIFF'S EXHIBIT 6."

Ninety Day Operator—Motor Vehicle Form No. 8

BEFORE THE PUBLIC SERVICE COMMISSION OF INDIANA.

In the Matter of the Application of Schappi Bus Line, Incorporated, for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles as a Common Carrier. } Application No. 327-M

By the Commission:

On May 25, 1925, Schappi Bus Line, Incorporated, of Calumet City, Illinois, filed with the Public Service Commission of Indiana a verified ninety-day application for a certificate of public convenience and necessity for the operation of motor vehicles in the transportation of passengers only on certain highways of the State of Indiana for hire as a common carrier. In said application the points between which applicant is operating and the rates and charges for the service rendered, were set out.

The applicant also filed policies of insurance carrying the prescribed endorsements of this Commission guaranteeing

the payment of all damages which may result from any and all accidents due to negligence in the operation of motor vehicles authorized to be operated by the terms of this order. These policies are as follows:

Hartford Accident & Indemnity Company, Policy No. A. L. P. 738660.

The Commission having examined said application and said policies of insurance finds that each of them meet the requirements of Chapter 46 of the Acts of the General Assembly of the State of Indiana for 1925, and the requirements of the rules and regulations of this Commission authorized by said Act, and that said application and policies of insurance should be approved.

It Is Therefore Ordered by the Public Service Commission of Indiana, that certificate of convenience and necessity be, and it is, issued to the applicant, Schappi Bus Line, In-
63 corporated, for the operation of motor vehicles as a common carrier of passengers on the public highways of the State of Indiana over the following route, to-wit:

From Indiana State Line to East Chicago, Indiana, passing through Hammond over the following route: Leave Garfield Avenue & Harrison St.; East on Garfield to Lincoln; South on Lincoln to 154th Street; East on 154th Street to Forsythe; South on Forsythe to 156th Street; East on 156th Street to Hohman; North on Hohman to State Street; East on State Street to Calumet Avenue; North on Calumet to 150th Street; East on 150th to Forsythe (E. Chicago); North on Forsythe to Chicago Avenue; East on Chicago Avenue to Euclid Avenue; North on Euclid to General American Tank Corporation,

and to use in said service the motor vehicles described in said application and such other motor vehicles as may be lawfully operated thereunder as additional, replacement, or emergency equipment under any order or ruling of the Public Service Commission of Indiana. The application herein and all exhibits and affidavits attached thereto are hereby made a part of this order.

Approved by the Public Service Commission of Indiana this 3rd day of July, 1925.

PUBLIC SERVICE COMMISSION OF INDIANA,
(Signed) J. W. MCCARDLE,
Chairman.

(Seal)

Attest:

HOWELL ELLIS,
Secretary.

64 Certificate of Public Convenience and Necessity
Motor Vehicle Form
No. 9.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF INDIANA

In the Matter of the application of Schappi Bus Line, Inc.,——— for a certificate of public convenience and necessity to operate motor vehicles as a common carrier.	Application No. 327-M Certificate No. 327-M

Certificate of Public Convenience and Necessity.

The Public Service Commission of Indiana hereby certifies that, after an investigation and hearing upon the above entitled application, an order was made and entered by it, which is made a part hereof, whereby it found and ordered that said application be granted and that a certificate of public convenience and necessity be issued to said applicant, and this certificate is now issued to Schappi Bus Line, Incorporated, certifying that public convenience and necessity require the operation of the motor vehicles described in said order upon the route, time schedule and rates set forth in the aforesaid application and order as provided in Chapter 46 of the Acts of the General Assembly of the State of Indiana for the year 1925. This certificate shall cover any and all other motor vehicles which the holder may be authorized to operate under any order or rule of the Public Service Commission of Indiana, either as additional, special, substitute, replacement or emergency equipment.

In testimony whereof the Public Service Commission of Indiana has caused this certificate to be signed by its Chairman and attested by its Secretary, this 3rd day of July, 1925.

PUBLIC SERVICE COMMISSION OF INDIANA
(Signed) J. W. MCCARDLE,
Chairman.

(Seal)

Attest:
HOWELL ELLIS,
Secretary.

65 (7). A certified transcript of proceedings and judgment had in Cause No. 10624 in the City Cour of Hammond, Indiana, which was identified and marked as "Plain-

tiff's Exhibit 7", in which case the City of Hammond was plaintiff and one Clarence E. Dome was defendant, and which suit was brought for the alleged violation of Ordinance No. 1945 by said Clarence E. Dome, defendant, an employe of the plaintiff, and which said Ordinance is the same identical ordinance as set forth and copied in plaintiff's verified complaint, and to which offered evidence the defendant objected, and the Judge of said Court sustained said objection, and plaintiff excepted to such ruling; and said offered evidence was not introduced, nor read in evidence.

(8). A certified copy of Ordinance No. 1945 of the City of Hammond, the same being a certified copy of the same ordinance set forth in plaintiff's verified complaint, was marked for identification as "Plantiff's Exhibit 8", and was introduced and read in evidence, and is in words and figures following, to-wit:

66 "PLAINTIFF'S EXHIBIT 8."

#1945.

An Ordinance Regulating and Routing Certain Vehicles for Hire, and Prohibiting Their Use of Certain Streets Within the City of Hammond.

Section 1. Be It Ordained by the Common Council of the City of Hammond, Indiana, that in order to promote public safety and order, and to diminish the congestion of vehicular travel within said City, from and after the taking effect of this Ordinance it shall be unlawful for any person, firm or corporation owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon, or over any of the following parts of streets within said City of Hammond, to-wit:

On Hohman Street from Russell Street to Michigan Avenue;

On State Street from Morton Court to Calumet Avenue;

On Sibley Street from the easterly line of the right of way of the Chicago, Indianapolis & Louisville Railway Company where the same crosses Sibley Street westerly to Morton Court.

On Fayette Street from Hohman Street to Oakley Avenue.

Section 2. From and after the taking effect of this Ordinance it shall be unlawful for any person, firm or corporation

owning or operating any motor vehicle carrying passengers for hire, to stop such vehicle for the purpose of receiving or discharging passengers upon any street, alley or other public place within said City; provided, that the Board of Public Works may, for any period not exceeding six (6) months or successions thereof, permit such operation on any or all of the following designated parts of streets: Columbia Avenue, between the South City limits and the right of way of the Michigan Central Railroad where the same crosses said Columbia Avenue; Sibley Street from Columbia Avenue to the easterly line of the right of way of the Chicago, Indianapolis & Louisville Railway Company; State Line Street from its southerly terminus to its northerly terminus at or near the right of way of said Michigan Central Railroad aforesaid; Rimbach Avenue from State Line Street to Ann Street; Ann Street from Rimbach Avenue to Russell Street; Russell Street from Ann Street to State Line Street, and for vehicles engaged strictly in interstate commerce, any street or other public place north of 122nd Street and east of Calumet Avenue.

67

Section 3. Whoever violates any of the provisions of Sections 1 and 2 of this Ordinance, shall, upon conviction, be fined in any sum not exceeding Fifty ($50.00) Dollars for each and every offense, but nothing in this Ordinance shall be construed to impair the obligation of any contract to which the City is a party, under which such motor vehicles are now operated for hire within said City. Nothing herein shall apply to taxi-cabs.

Section 4. This Ordinance shall supplement such ordinances as are now in force, and repeal only so much of them or any part thereof as may be in direct conflict herewith.

Geo. J. Wolf,
President.

Attest:
Arnold H. Kunert,
City Clerk.

Submitted to the Mayor for his approval this 23rd day of May, 1925.

Approved by me this 23rd day of May, 1925.

Daniel Brown,
Mayor.

Filed in my office after approval by the Mayor this 23rd day of May, 1925.

Arnold H. Kunert,
City Clerk.

State of Indiana } ss.
County of Lake }

I, Arnold H. Kunert, City Clerk of the City of Hammond, said county and state, and clerk of the City Court of said City, do hereby certify that the above and foregoing is a true and correct copy of Ordinance No. 1945 as passed by the Common Council on May 23, 1925, and as contained in the ordinance book.

ARNOLD H. KUNERT,
City Clerk.

(Seal)

By: HARRIET KLEE,
Deputy Clerk.

68 (9). Plaintiff offered in evidence a Warranty Deed from James P. Bereolos, and wife, to the Hammond Hotel & Improvement Company, which Deed was marked for identification as "Plaintiff's Exhibit 9", and to which offered evidence the defendant objected, and stated to the Judge of said Court, that:

"So far as the issues in this case are concerned, the land described in "Plaintiff's Exhibit 9" shall be treated as private property, assuming that the description in said Exhibit 9 is a correct description of the private terminal of plaintiff on land in the City of Hammond."

And upon defendant's counsel having made said statement to the Judge of said Court, the plaintiff withdrew said offered evidence, so marked as "Plaintiff's Exhibit 9" as aforesaid;

And thereupon the plaintiff rested its case in chief.

69 And the defendant, to sustain the issues upon its part, then offered and introduced the following evidence, to-wit:

(1) The affidavit of Daniel Brown, with map attached as "Exhibit A" thereto, was marked as "Defendant's Exhibit 1," and was offered and read in evidence, and is in words and figures following, to-wit:

70 DEFENDANT'S EXHIBIT 1."

* * * * * *

Affidavit of Daniel Brown for Defendant.

DANIEL BROWN, being duly sworn upon oath, says: that he is the Mayor of the defendant City of Hammond, and has been such for more than seven (7) years last past, and as such officer he is charged with the administration of the law and the enforcement of the ordinances of said City; that the Police Department of said City is under his supervision, direction and control; that he is familiar with the various and several streets of said City, particularly in the so-called business district thereof, and is also familiar with traffic conditions therein.

Affiant says that the business district of said City consists chiefly of Hohman Street from Michigan Avenue South to Condit Street, the principal business buildings on said street being located between Plummer Avenue and Clinton Street; that it consists further of State Street from State Line Street to and slightly beyond Calumet Avenue to the east, the principal business buildings of which are between Morton Court and Sohl Street; further, of Sibley Street from Oakley Avenue to Morton Court, and of a portion of Fayette Street, of Rimbach Avenue and other streets intersecting Hohman Street and within a short distance thereof, and of Calumet Avenue from Eaton Street to Grand Calumet River; that there are other business districts and centers in said City of lesser importance and extent; that Hohman Street
71 from the Grand Calumet River, which is two blocks north of Michigan Avenue, south to Russell Street is sixty feet in width; that it has a single track street car line in the center thereof from Russell Street north for a distance of six blocks, and a double track line north thereof to and beyond Michigan Avenue; that said State Street is also sixty feet in width and has a double track street car line thereon from Calumet Avenue west to Hohman Street, and a single track street car line from Hohman Street west to Morton Court; that Sibley Street has a single track street car line thereon east of Oakley Avenue, and a double track street car line from Oakley Avenue to Hohman Street, and a single track street car line from Hohman Street to Morton Court;

that Hohman Street, State Street, Sibley Street and Fayette Street are intersected and crossed by the double track railroad line of the New York, Chicago & St. Louis Railroad, the double track of the Erie Railroad, and the single track of the Chicago, Indianapolis & Louisville Railway, all with contiguous rights of way; that upon said railroads many hundreds of cars are moving each day across said streets, and frequently freight trains of a length exceeding one-half mile are hauled across said streets at grade; that said Hohman Street is further crossed at right angles by the Michigan Central Railroad, consisting of four main tracks, located silghtly more than one block north of the corner of State and Hohman Streets hereinafter referred to; that many hundreds of trains cross to and fro on said tracks during the twenty-four hours, and frequently freight trains of much more than one-half mile in length are slowly drawn across said streets at grade; that said railroad intersects the first three named railroads in or adjacent to its crossing of said Hohman Street; that the corner of State and Hohman Street has been generally referred to as the principal business corner of the City.

Affiant further says that on the accompanying map, attached hereto and made a part hereof, marked Exhibit "A," the streets and parts of streets upon which motor bus operation is forbidden are indicated in blue; that the streets within or near the business district which are open to the movement of motor coaches, whether interstate or intrastate, are indicated thereon in red.

Affiant further says that the traffic congestion problem in the City of Hammond has become a serious one, and difficult to handle and control; that the vehicular traffic on the streets in and adjacent to said business district is very heavy; that for several years jitneys were operated thereon, consisting chiefly of small touring cars, several hundred in number, which badly congested the streets, and particularly because of their stopping to load and unload passengers, they caused delay to other traffic, and by ordinance of the City, said jitney business was finally eliminated, and thereby the
72 congestion somewhat reduced; that about said time a franchise contract was entered into between the City and Calumet Motor Coach Company for the operation of motor coaches on the streets of Hammond, and said motor coaches supplanted and took the place of said jitneys, very

much to the relief of congestion and the general satisfaction and convenience of the public; that within the past six or eight months, a large number of other motor busses have been introduced into the City and its environs; that none of said motor busses, and this includes those operated by the plaintiff, have any franchise or contract of any kind with the City; that they run to and fro, and particularly through the congested business district, at times that suit their pleasure and convenience, and have added greatly to the congestion and confusion; that it is nothing uncommon for vehicular traffic to be held up with a solid line of cars extending as much as three blocks, in the heart of the business district; that such delay is caused in part by the motor busses operated by the plaintiff herein, and to a large extent by the movement of railroad trains across said streets, as hereinbefore mentioned, and in part by the narrowness and congestion of the streets generally; that immediately to the west of said City of Hammond is a city known as Calumet City in the State of Illinois; that one street, to-wit: State Line Street, is a dividing street between said states and cities, the state line being approximately in the middle thereof.

Affiant further says that the plaintiff, and other operators of motor busses having no franchise or contract with the City, run many motor busses from said Calumet City into and through the business district of the City of Hammond, and from adjoining cities and towns to the south and east to-wit: East Chicago, Griffith, Highland, Munster, Thornton, Lansing, Chicago Heights, and other places in the vicinity; that some of said busses are engaged in interstate commerce, and others wholly in intrastate commerce; that the said City Council of said City did, on May 22nd, 1925, pass Ordinance No. 1945 designed to control and regulate vehicular traffic conducted for hire in said City; that said Ordinance became effective on the 9th day of June, 1925, and is now in full force and effect.

Affiant further says that the plaintiff herein has been running and routing its motor busses engaged in service to and from Chicago, Illinois, in a way to add greatly to the confusion, congestion and delay in the business district of said City, that the street car service to which reference is made in the Bill of Complaint herein, is service that has been rendered for many years under a franchise contract, which was later surrendered for an indeterminate term in accordance

with the laws of Indiana; that service rendered by said
73 Calumet Motor Coach Company is rendered under its franchise contract with the City, which franchise service was established in November, 1924, and has been continuously maintained solely under such franchise contract.

Affiant denies that the said City, its agents or officers have any intention or purpose of destroying the interstate commerce of the plaintiff, and denies that it has discriminated among those similarly situated; that any and all having a franchise or contract to stop to receive and discharge passengers in the public streets will be accorded said privilege, and all others will be prohibited from so doing. Affiant says that the express purpose and intention of said ordinance is to promote the safety and good order of the public in said streets and to relieve congestion, confusion and delay therein; that all streets, alleys and other public places in said City not mentioned in Section 1 of said ordinance, and not indicated in blue on the accompanying map, are open to the plaintiff and all others engaged in interstate or other commerce for the purpose of passing to and fro with any and all vehicles that are lawful to be used in said commerce, or are used on the streets or highways of the State of Indiana; that the plaintiff is not denied the right so to pass; that it is denied the privilege of stopping in any street or other public place to receive or discharge passengers, and save for the streets mentioned in Section 1 of said ordinance, it is not denied nor restricted in any sense in the choice of streets over which it will pass.

Affiant expressly denies the allegation in said sworn Bill or Complaint to the effect that the highways over which it operates its motor busses are not unduly congested, and expressly affirms that they are greatly congested; that such congestion has reached the point where agitation is going on, and in some cases has been crystallized into action for the widening of certain streets; that State Street west of Hohman Street is in process of widening for a space of twenty-eight feet; that said street east of Oakley Avenue is in process of widening for a space of twenty feet; that Hohman Street south of Russell Street has recently been widened, for a space of twenty feet; that tentative plans are under way for the widening of Hohman Street from State Street to Russell Street for a space of twenty feet; that all of said enterprises entail great expense and cost to the City and the property

owners; that plaintiff insists upon operating its motor busses on Sibley Street west of Hohman Street, and affiant says that in both of said streets, there is a street car track in the middle of the street, and that it is impossible for a motor bus and a street car to pass each other in either of said streets where cars are parked at or near the curb line, and that cars are so parked on said streets for a limited time.

74 Affiant denies that any part of the streets over which the plaintiff is forbidden to run has been improved by Federal Aid, but says that on the contrary, said streets and parts of streets have been improved wholly by special assessments against the benefited property.

Affiant further says that insofar as priority of operation is concerned as between the plaintiff herein and the said Calumet Motor Coach Company, in service between the City of Hammond and the City of Chicago, Illinois, the said plaintiff herein was duly informed by the Board of Public Works of said City before it commenced said operation, that said Calumet Motor Coach Company was preparing to inaugurate such service. Whereupon the plaintiff, as affiant is informed and believes, procured a number of partially painted, unfinished and unlettered motor busses and commenced its said service with said cars for the evident purpose of being the first in the field, when it had knowledge at the time that the Company operating under a contract with the City of Hammond was about to begin such service.

Affiant says that where employes of plaintiff have been arrested under the so-called charge of "loading passengers" that said phrase was used merely by the Police Department to be an entry upon the arrest book and that in each and all cases a form of complaint was filed by the City against the defendant so arrested, charging him with the violation of Ordinance No. 1945, referred to in plaintiff's complaint.

Affiant denies that the defendant City, its Mayor, Chief of Police, officers or agents claim any right to prevent plaintiff from carrying on the business of hauling passengers for hire between the cities and State of Illinois and the State of Indiana, but merely the right to enforce the provisions of Ordinance No. 1945, and ordinances of like import and effect.

Affiant denies the allegation in said sworn Bill of Complaint that the said defendant has arrested plaintiff's employes, charging them with no other offense than simply stopping plaintiff's motor busses to pick up and let off passengers

within the City of Hammond, and affiant denies that there is any threat or intention to arrest or prosecute plaintiff's employes for so doing, but any arrests that have been made or will be made in the future are simply made for the purpose of carrying out and enforcing the provisions of said ordinance, and to prevent the stopping of plaintiff's said vericles in public streets for the purpose of transacting its private business of receiving and unloading passengers therein.

Affiant expressly denies the allegation in said Bill of
75 Complaint concerning arrest or threat to arrest plaintiff's employes because of being on the strip of ground alleged in said complaint to be a private strip of ground owned by the Hammond Hotel & Improvement Company.

Affiant further says that the question of whether said strip of ground has been dedicated to public use for a city street is now in litigation, and the defendant City has expressly agreed that pending the decision of the question of whether said strip of ground has been dedicated to public use for street purposes, defendant will treat said strip of ground as private property so far as any controversy between said defendant City and the plaintiff herein is concerned; that no arrests will be made and none have been made of any of the plaintiff's drivers for so doing, except possibly the arrest of one Lansdowne, on July 8, 1925, mentioned in said complaint, which was made by a member of the police force for violating city traffic ordinance, which cause was later dismissed and said Lansdowne discharged. Affiant says that pending the decision as to whether or not said strip of ground is a public place within the meaning of said Ordinance No. 1945, plaintiff will be permitted freely to receive and discharge passengers thereon without molestation.

Affiant further says that plaintiff has free, open and convenient access to said strip of ground for its motor busses without passing longitudinally over any street or part of street mentioned in Section 1 of said Ordinance No. 1945; that State Line Street is improved in both Indiana and Illinois by an asphalt macadam pavement and is a street of ample width and not congested; that Plummer Avenue is also a wide street in the City of Hammond paved with concrete from the State Line easterly to Oakley Avenue; that Oakley Avenue is also paved with concrete from Plummer Avenue to Michigan Avenue, and Michigan Avenue is a concrete pavement extending easterly from Hohman Street past Oakley

Avenue for more than two miles, and connecting with the main street of the City of East Chicago, Indiana; that Plaintiff's motor busses running from Calumet City, Illinois to East Chicago, Indiana, as mentioned in said Bill of Complaint, may readily, easily and speedily pass over State Line Street, Plummer Avenue, Oakley Avenue and Michigan Avenue and other improved streets in said City, none of which are unduly congested or closed to the plaintiff, except those parts of streets indicated in blue and the accompanying map, and mentioned in Section 1 of said ordinance; that plaintiff can readily, easily and conveniently operate its Chicago service from said so-called private terminal by way of Plummer Avenue, Oakley Avenue, Michigan Avenue and Hohman Street, north of Michigan Avenu, without undue delay, and on streets that are not so congested as Hohman Street
76 between Michigan Avenue and Russell Street, and with a minimum of interference with traffic on said streets; that all said streets are open to plaintiff for the movement of its said cars; that as affiant understands the controversy between the plaintiff and the defendant City, it is wholly about the question of whether the plaintiff shall be permitted to run on Hohman Street between Michigan Avenue and Sibley Street, which affiant says is the most congested portion of said street; that the defendant city has sought to place no further restrictions or limitations of any kind upon the plaintiff's said operation. Affiant expressly denies that plaintiff has been forbidden or will be forbidden to use said strip of ground as a loading and unloading ulace or prosecuted for so doing, so long as the question of its being public or private is in controversy.

Affiant denies that the said City Court of the City of Hammond has passed on the merits of any case before it, but says that on the contrary, said Court has limited its decision to a ruling on the demurrer to the complaint filed in each case, and has not heard evidence nor gone into the merits of any of such cases; that the City has appealed from each and all of said decisions so rendered by said City Court on the cases commenced on the 22nd day of July, 1925, and affiant denies the statement in said sworn bill that the City Court conducted "a full hearing thereof" in any of said cases, but says that they were disposed of only on demurrer as aforesaid; that affiant expressly denies the charge and allegation often repeated in said complaint that the enforcement of said ordi-

nance is intended to or will destroy plaintiff's interstate commerce, or that its enforcement is discriminatory or unreasonable in any sense.

(Signed) DANIEL BROWN,
Mayor.

Subscribed and sworn to before me this 14th day of September, 1925.

(Seal of District Court of the United States, District of Indiana.)

WM. P. KAPPES,
Clerk, U. S. District Court.

MAPS

TOO

LARGE

FOR

FILMING

78 (Endorsements on back of Affidavit of Daniel Brown for Defendant:

* * * * * *

Affidavit of Daniel Brown for Defendant.

(Stamped:
Filed
Aug. 6, 1925.
William P. Kappes, Clerk.

79 And thereupon defendant rested its case in chief.

And the plaintiff, to further sustain the issues upon its part, then offered in rebuttal the following evidence, to-wit:—

(1). The affidavits of Henry Schappi and Henry Schappi, Jr. were marked for identification as "Plaintiff's Exhibit 10", and were offered and read in evidence, and are in words and figures following, to-wit:—

80 "PLAINTIFF'S EXHIBIT 10."

* * * * * *

Additional Affidavit in Support of Plaintiff's Complaint for Temporary Injunction, and in Reply to the Affidavit of Daniel Brown Filed by Defendant Herein, Etc.

HENRY SCHAPPI, and HENRY SCHAPPI, JR., each being first duly sworn, upon oath say, that:

They are respectively the President and Secretary of the plaintiff, Schappi Bus Line, Incorporated, and affiants each, separately and severally, upon their oaths say, that: they have had read to them the affidavit of Daniel Brown, made by him and filed by the defendant in this cause, in opposition to plaintiff's motion for a preliminary injunction; and affiants each separately say, that: they are each familiar with, and know, the condition of motor vehicle traffic within the City of Hammond, Indiana, and in all parts of said City, and particularly in the so-called business district of said City, and that they have been personally acquainted with the condition of such vehicular traffic for many years last past;

And affiants each separately say, that, the statement, made on page four (4) of said affidavit of said Daniel Brown, to the effect, that:

"that it is nothing uncommon for vehicular traffic to be held with a solid line of cars extending as much as three blocks in the heart of the business district; that such delay is caused by the motor busses operated by plaintiff herein,"

81 is untrue, and without any foundation in fact, and affiants say, that, no such condition ever occurred to the knowledge of these affiants; and affiants say positively, that, they know that no such condition ever occurred, or was caused, at any time or place by any of the motor busses operated by plaintiff; that, if such a condition ever did occur, it was caused solely by reason of railroad trains crossing the street and stopping the traffic, and not otherwise; that, at no time was any such delay, in whole or in part, caused by motor busses, either of plaintiff, or by those owned by other persons; that such statement is an exaggeration, and is wholly untrue; that plaintiff is in no way to blame, and has nothing to do with the operation of railroad trains across the streets of the City of Hammond; and plaintiff in no way contributes to any stoppage of traffic by reason of railroad trains crossing the streets at grade in said City;

And affiants further say, that, they expressly deny the further statement in the affidavit of said Daniel Brown, found on pages four and five thereof, to the effect, that:

"The plaintiff herein has been running and routing passenger busses engaged in service to and from Chicago, Illinois, in a way to add greatly to the congestion and delay in the business district of said City."

And affiants say, that, said statement, contained in the affidavit of said Daniel Brown, is wholly untrue, and without any foundation in fact whatsoever;

And affiants further say, that, they expressly deny the statement in said affidavit of said Daniel Brown, found on page five thereof, to this effect, that:

"The plaintiff is not denied the right so to pass," meaning, to pass over the streets of the City of Hammond, as well as others engaged in interstate, or other commerce;

But, affiants say, that, said defendant, City of Hammond, through its Mayor and police officers, has entirely prohibited, by arresting plaintiff's drivers, and servants in charge of its auto busses, from operating over the streets of the City of Hammond, until the temporary restraining stipulation was

made in the presence of Judge Samuel Alschuler in this cause; that, in all, an aggregate of forty-seven (47) arrests of plaintiff's employees and drivers have been made by said defendant City, through its police officers, twenty-two (22) arrests being made upon a single day, and by means of
82 which plaintiff's auto busses and drivers were completely driven from any of the streets of the City of Hammond; and affiants say, that, it is the purpose and intention of said defendant, City of Hammond, to entirely prohibit plaintiff from carrying on its business in the carrying of passengers for hire over the public highways in the City of Hammond and State of Indiana, whether engaged either in interstate commerce or intra-state commerce; and, that, it is the intention of said defendant City so to do, notwithstanding that said defendant City, and each and all of its officers and servants, know that plaintiff is authorized by, and has received from, the Public Service Commission of Indiana, Certificates of Public Convenience and Necessity, authorizing, and empowering, and directing it to carry on its said business over said highways described in said Certificates, and described in plaintiff's complaint herein; but affiants say, that, notwithstanding, said defendant, City of Hammond, through its police officers, disregards and ignores said Certificates of Public Convenience and Necessity, and arrests, and will continue to arrest and drive plaintiff's employees and auto busses from the streets of the City of Hammond, unless said defendant, and its officers and servants, are enjoined and restrained from so doing;

And affiants further say, that, they separately and severally deny the statement in said affidavit of said Daniel Brown, found at page five thereof, to the effect, that:

"Plaintiff is not denied, nor restricted, in the choice of streets over which it will pass."

That, said statement is untrue, in this, that: the said defendant City, through its police officers, has denied plaintiff the right to operate over the only streets leading into the business district of the City of Hammond, and have discriminated against this plaintiff, and arrested its employees, and driven plaintiff's auto busses from the streets, and bus drivers from the streets by force, while, at the same time and place, and over the same streets, said City, and its police officers, permitted and allowed other persons and corporations to operate auto busses in the carrying of passengers for hire, engaged in the exact, same identical business of trans-

porting passengers for hire in which plaintiff was then and there engaged when plaintiff's employees and drivers were arrested;

And affiants each further say, that, they expressly deny the statement contained in the affidavit of said Daniel Brown, and found at pages six and seven thereof, to the effect, that: the Board of Public Works of the City of Hammond informed plaintiff, before it began the operation of its 83 motor busses and service, that the Calumet Motor Coach Company was preparing to inaugurate a service;

And affiants further deny the statement, that, in the affidavit of said Daniel Brown, found at page seven of said affidavit, to the effect, that:

"The plaintiff * * * procured a number of partially painted, unfinished, and unlettered motor busses, and commenced its service with said cars, with the evident purpose of being the first in the field, when it had knowledge at the time that the company, operating under a contract with the City of Hammond, was about to begin its said service."

And affiants say, that, said statement in said affidavit of Daniel Brown, and each and every part, is wholly untrue, and without any foundation in fact whatsoever.

And affiants further say, that, they expressly deny the further statement in the affidavit of Daniel Brown, found on page eight thereof, to the effect that:

"The question of whether said strip of land has been dedicated to public use for a city street, is now in litigation."

That, affiants are informed, and believe, that no such litigation exists involving said question; and affiants are further informed, and believe, that said strip of ground has never been dedicated to public use for a city street by any person or persons whomsoever, and that no such dedication exists;

And affiants further say, that, they are informed, and believe, that said strip of ground, used by plaintiff in connection with its waiting room and private terminal at Number 536 Hohman Street in the City of Hammond, in the Indiana Hotel Building, is private property owned in fee simple by the Hammond Hotel & Improvement Company, a corporation, which company has leased said waiting room at Number 536 South Hohman Street, together with the right to use said strip of ground, for loading and unloading purposes, for a period of five (5) years from the first day of August, 1925; and, that, plaintiff is so using the same at this time, and has

been continuously since the date of said lease, and by verbal permission of the owners, and by parol permission and license even prior to said date;

And affiants further say, that, by actual count and estimates made of the number of motor vehicles, and other vehicles, passing over Hohman Street and other streets of the City of Hammond, that they affirm and say on oath, that
84 the streets of said City are not unduly congested by reason of vehicular traffic; that on Hohman Street, and upon State Street, and upon Sibley Street, the number of actual moving vehicles, including motor and other vehicles, will rarely, if ever, exceed at any one period, six (6) moving vehicles within a city block, or a distance of approximately three hundred (300') feet at any one time; that, exceptionally, a railroad train, crossing the streets of the City of Hammond, in and near the business district, does stop the vehicular traffic on the streets of said City, resulting in the congregating of more vehicles therein at any one period than as aforesaid; but, when the vehicular traffic of the City of Hammond is not stopped by railroad trains, it rarely, if ever, happens that more than six (6) moving vehicles have been found and counted within any one given block at a given time in any portion of said City of Hammond;

And affiants say, that, the public highways and streets of the said City of Hammond are sufficiently wide, and so constructed, as to accommodate more than double the amount of vehicular traffic now passing thereon; that all seeming congestion, that does appear and result in said City, and in the streets thereof, is caused, not by the vehicular traffic and the auto bus service rendered by plaintiff and other auto bus companies thereon, but it is caused, first: by the railroad trains, which frequently cross the streets of said City, causing a stoppage in the moving traffic; and, second: by the further cause resulting from the parking of an unreasonable and undue number of motor vehicles and auto busses along the sides of the curb and streets of said City, which parking of vehicles said defendant City permits for one (1) hour and more on each and all of the streets of said City;

That on said Hohman Street, and upon said State Street, and upon said Sibley Street, in the most important and most fully built-up business portion of said streets, and each of them, said defendant now permits any automobile, or other vehicle, to park on either side of said street at practically every point for a period of one (1) hour, without molesta-

tion; that two lines of motor vehicles, parked on each side of said streets, has the effect of narrowing the usable part of said streets; that practically all the apparent congestion, that appears on the streets of said City of Hammond, affiants say, is caused by those two causes hereinabove set forth; and affiants say, that, this plaintiff does not, and has not, at any time heretofore, since it began the operation of its auto busses in the carrying of passengers for hire, at any time or place, parked its auto busses on any of the streets of the City of Hammond; that it has never at any time or
85 place parked, or sought to park, the same for any period of time whatsoever; that the only time that it has stopped its auto busses has been for the taking on and letting off of passengers, at which times said stop has not at any time exceeded from two (2) to five (5) minutes' time; that plaintiff has at all times, in the operation of its auto busses in the carrying of passengers for hire, when the passengers have been unloaded therefrom, unless such auto bus was to proceed in a further trip, plaintiff has sent said auto bus immediately to plaintiff's garage in the City of Calumet City, Illinois, there to be put in the garage and remain until it was necessary to use the same in plaintiff's business; and affiants say, that, plaintiff is in no way responsible for said alleged congestion in the streets of the City of Hammond, which is caused solely by the acts aforesaid, and by the neglect of the officials of said defendant City of Hammond to enforce reasonable and proper parking ordinances in said city;

That plaintiff's auto busses, used on the several routes as described in its complaint herein, only pass over each of said routes at periods of approximately twenty (20) minutes; that said passage of plaintiff's said auto busses in no way conflicts with, or hinders, other vehicular traffic, or pedestrian traffic, on the streets of said city; that plaintiff has at all times complied with all police regulations for the safety of pedestrian traffic at the intersection of streets, alleys and railroad crossings, and other public places; that plaintiff has complied with all rules and regulations of the State of Indiana, and all laws thereof, all and singular, and stands ready and willing at all times so to do, as well as all reasonable and proper regulations of said City of Hammond;

But affiants say, that, it is the purpose of said defendant, City of Hammond, by the ordinance which it has passed, at the request of said Calumet Motor Coach Company, to pro-

hibit plaintiff from operating and carrying on its said business in said City of Hammond, and passing over the public highways in said city; not for the purpose of regulating traffic particularly, but for the sole and only purpose of prohibiting and preventing competition with said Calumet Motor Coach Company more than anything else;

And affiants further say, that, they are informed, and believe, and so charge the fact to be, that it is not the City of Hammond, defendant herein, so much that seeks to prevent plaintiff from operating its said auto busses in the carrying of passengers for hire, but that said City, and its said officials, are influenced in their persecution of plaintiff, to do and continue the same, by the officials and representatives of said Calumet Motor Coach Company; that, in fact,
86 the process of arrest, and the police officials of the City of Hammond, are being used unlawfully to persecute plaintiff, through the influence of the officers and officials, and representatives, of said Calumet Motor Coach Company with such officials and officers of said City, and not for any public purpose; that the acts of said defendant City, and its officials, are, therefore, as affiants believe, and so charge the fact to be, for the purpose of persecuting this plaintiff in an endeavor to drive it from carrying on its business, which it has established, and to completely prohibit it from carrying on its business in the carrying of passengers for hire, both interstate and intra-state, to the end that plaintiff will be prevented from in any way competing with said Calumet Motor Coach Company; that the prosecution and arrests, and interference, of said defendant, City of Hammond, through its Mayor and police officials and servants, with this plaintiff were not in good faith, as affiants verily believe, but are carried on for an ulterior purpose, and not for the public benefit; that such ulterior purpose is, as these affiants verily believe, the direct interference with the business of this plaintiff, and for the purpose of prohibiting it, and preventing it, from carrying on its business as aforesaid, to the end, that, said Calumet Motor Coach Company, who the City officials of the City of Hammond desire to favor, shall not have the competition of plaintiff, notwithstanding that plaintiff, as aforesaid, has received and obtained the authority to carry on its business, as evidenced by the Certificates of Public Convenience and Necessity, issued to it by the Public Service Commission of Indiana, the public body which has full and complete jurisdiction to regulate the carrying of passengers

for hire by motor vehicles, over the public highways of the State of Indiana; that said defendant City, and its officials, simply disregard and ignore plaintiff's rights, and unlawfully arrest plaintiff's drivers and employees in their unlawful attempt to prohibit, and prevent, plaintiff from carrying on its business in the transporting of passengers for hire, as aforesaid, and to aid said Calumet Motor Coach Company, and for no other purpose.

And affiants further say, that, unless the defendant, City of Hammond, its Mayor, and police officers, are restrained and enjoined from further interfering with plaintiff, and plaintiff's employees, as alleged and set forth in plaintiff's complaint in this cause, and in this affidavit, said defendant will entirely ruin and destroy plaintiff's business, to its great and irreparable loss and damage; that plaintiff has invested in its several auto busses and equipment for carrying on said business, more than Fifty Thousand ($50,000.00) Dollars in capital; that it employs fifteen (15) drivers daily; that it has established a bus terminal on private ground, and in private building in the City of Hammond, out of
87 which, and from which, it operates; that it, also, has established a private terminal in the City of Chicago, Illinois, and in other places; that it has established a like private terminal in Calumet City, Illinois; in all, involving an outlay and investment of capital of approximately Seventy-five Thousand ($75,000.00) Dollars; that, if plaintiff is prohibited, by said defendant, City of Hammond, from carrying on its business as aforesaid, over the public highways, where it has been authorized by the Public Service Commission of Indiana, by lawful Certificates of Public Convenience and Necessity so to do, that said capital, so invested, will be largely, if not entirely, lost,—all to plaintiff's irreparable loss and damage.

And affiants further say, that, said purported ordinance entirely forbids plaintiff from carrying on its business, either in interstate carriage of passengers, or in intra-state carriage of passengers, without it can obtain the permission of the Board of Public Works of said City, and which permission said Board of Public Works has arbitrary power, under said alleged ordinance, to withhold for any reason, or upon any ground, or any cause whatsoever; that, by Section 2 of said ordinance, plaintiff, while engaged in the carrying of interstate commerce, would not be permitted to come farther south in said City of Hammond than 122nd Street and Calu-

met Avenue, which means, not nearer to the business section of said city of Hammond than approximately four (4) miles; that said alleged ordinance is unreasonable, unfair, and void; and is an arbitrary and unlawful discrimination against this plaintiff; that said ordinance was passed by the Common Council of the City of Hammond in bad faith, and at the request of said Calumet Motor Coach Company, and for the sole and only purpose of permitting and enabling said defendant, City of Hammond, to discriminate against plaintiff, and other auto bus operators, in favor of said Calumet Motor Coach Company, and for no other purpose whatsoever; that the primary purpose of said ordinance is not regulation of vehicular traffic, with a view to safety, or conservation of the highways; but, instead, is for the sole and only purpose of prohibiting plaintiff, and for other operators of auto bus companies, from competing in any way whatsoever with said Calumet Motor Coach Company; that said ordinance does not determine the manner of use of the highways; but, instead, attempts to determine, and attempts to give, to the Board of Public Works of the City of Hammond, an arbitrary power of determining, who may use the highways within the corporate limits of said City, for the purpose of carrying passengers for hire; that said ordinance, on its face, prohibits the use of public highways in said city to some persons, including this plaintiff, while permitting the use of said public highways in said city by others, for the same identical
88 purposes, and in the same identical manner; and, further, said purported ordinance, on its face, gives to said Board of Public Works of the City of Hammond an arbitrary power to determine whether the prohibition, contained therein, shall be applied to one person, and not as to other persons under the same or similar circumstanes; that, by reason of each and all of the aforesaid facts, affiants say, that said ordinance is unfair and unreasonable, and void, and creates an unfair discrimination against this plaintiff, and against the business of this plaintiff, and against the Public generally in the City of Hammond, who patronize this plaintiff;

That plaintiff is the original person who engaged in bus transportation of passengers for hire in the City of Hammond; that plaintiff, and its immediate successors, have been engaged in transporting passengers for hire in the City of Hammond, and in the City of East Chicago, and in Calumet City, and to the City of Chicago, Illinois, for approximately

six (6) years, and have been so engaged in all of said time continuously; that, in such way, plaintiff has established said business and a patronage that will be entirely destroyed unless said defendant, City of Hammond, is enjoined and restrained from further unlawful interference with plaintiff's business; and further affiants say not.

(Signed) HENRY SCHAPPI
(Signed) HENRY SCHAPPI, JR.

Subscribed and sworn to before me this 14th day of September, A. D. 1925.

(Signed) W. J. WHINERY,
(Notarial Seal) *Notary Public.*

My notary commission expires November 20, 1927.

89 (Endorsements on back of Additional Affidavit, etc.:

* * * * * *

Additional Affidavit in Support of Plaintiff's Complaint for Temporary Injunction, and in Reply to the Affidavit of Daniel Brown, Filed by Defendant Herein, etc.

Wm. J. Whinery
Attorney and Counselor
Hammond, Ind.
Long Distance Tel. 269

90 (2). And plaintiff, at the close of the introduction of evidence in rebuttal as aforesaid, tendered its bond, signed by plaintiff as principal and the United States Fidelity & Guaranty Company as surety, by which bond plaintiff undertook to pay to the defendant any and all damages and costs, which might accrue to defendant by reason of a temporary injunction.

And This Was All the Evidence Given in the Cause on the Hearing Upon Plaintiff's Motion for a Temporary Injunction.

And the said Judge of said Court, after hearing the argument of the respective counsel, took said motion for a preliminary injunction under advisement.

And afterwards, to-wit:—on the 21st day of September, A. D. 1925, the said Judge of said Court, having considered the motion of plaintiff for a preliminary injunction in this cause, and the evidence introduced by the respective parties in support of said motion, and in opposition to the same, and

being sufficiently advised in the premises, refused to grant said temporary injunction, and denied said temporary injunction so prayed for by the plaintiff, to which rulings of the said Judge of said Court the plaintiff at the time duly excepted, asked, and was given thirty (30) days' time
91 within which to prepare and file all Bills of Exceptions.

And now, in furtherance of justice, and that right may be done, the plaintiff comes and tenders, and presents, the foregoing as its Bill of Exceptions in this case to the action of the said Judge of said Court in refusing to grant said temporary injunction, and in denying plaintiff's motion for a temporary injunction as aforesaid, and plaintiff prays that the same may be examined, settled, allowed, approved, signed, and sealed by the Judge of said Court, and made a part of the record in this cause;

And the said Judge of said Court, after having examined said Bill of Exceptions, finds that the same is true, complete, and properly prepared, and the said Judge of said Court now approves the same in all respects, and now approves the inserting therein by reference of plaintiff's verified complaint marked as "Plaintiff's Exhibit 1," and likewise defendant's answer, inserted therein by reference, and marked "Plaintiff's Exhibit 2," the same as though said exhibits had been copied in full therein; all in accordance with the provisions of Rule 10, Clause 3, of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit, which said exhibits "1" and "2" as aforesaid, were thus inserted by a reference as aforesaid, to avoid repetition in the transcript of the record in this cause;

And said Bill of Exceptions is now, by the said Judge
92 of said Court, in all things approved, settled, allowed, signed, and sealed by the said Judge of said Court, and made a part of the record in said cause, and the Clerk of said Court is ordered to file the same in his office in said cause, and that said Bill of Exceptions become a part of the record in said cause for the purpose of an appeal, all of which is accordingly done this 15th day of October, A. D. 1925.

In Testimony Whereof, I, Thomas W. Slick, Judge of said United States District Court, within and for the District of Indiana, have hereunto set my hand and seal this 15th day of October, A. D. 1925.

THOMAS W. SLICK
Judge of the United States District Court for the District of Indiana, presiding in said cause.

Sept. 15. 39 And afterwards, to-wit: On the 15th day of September, A. D. 1925, before the Honorable Thomas W. Slick, one of the Judges of said Court, in Chambers, at South Bend, Indiana, the following further proceedings were had and entered of record in the above entitled cause, to-wit:

* * * * * *

Come again the parties, plaintiff and defendant, by their respective attorneys, before the Honorable Judge of said Court, in Chambers, at South Bend, Indiana, and the hearing on the motion of plaintiff for a preliminary injunction is resumed, and the said Judge of said Court, after hearing the argument of the respective counsel, took said motion for a preliminary injunction under advisement.

Sept. 21. 40 And Afterwards, to-wit: On the 21st day of September, A. D. 1925, before the Honorable Thomas W. Slick, one of the Judges of said Court, the following further proceedings were had and entered of record in said cause, to-wit:

* * * * * *

Come again the parties, plaintiff and defendant, by their respective attorneys, and the said Judge of said Court, having considered the motion of plaintiff for a preliminary injunction in this cause, and the evidence introduced by the respective parties in support of said motion, and in opposition to the same, and being sufficiently advised in the premises, refused to grant said temporary injunction, and denied said temporary injunction, prayed for by the plaintiff, to which rulings of the said Judge of said Court the plaintiff at the time duly excepted, asked, and was given thirty (30)
41 days' time within which to prepare and file all Bills of Exception, and plaintiff also prayed an appeal from said interlocutory order of the said Judge of said Court, refusing to grant and denying said temporary injunction, to the United States Circuit Court of Appeals for the Seventh Circuit, which appeal was, by the said Judge of said Court, granted upon the said plaintiff filing its appeal bond in the sum of One Thousand ($1000.00) Dollars within thirty (30) days from said date, with the United States Fidelity & Guaranty

Company of Baltimore, Maryland, as surety thereon, or with A. Murray Turner, or William J. Whinery, or either of them, as sureties thereon, or with the National Surety Company of New York as surety thereon; either of which sureties were approved by the said Judge of said Court.

96 And, also, on said 15th day of October, A. D. 1925, the said Plaintiff filed in the office of the Clerk of said United State District Court, for the District of Indiana, its notice of appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to the defendant, City of Hammond, a municipal corporation, with acknowledgment of service of same by the attorneys for said defendant, which notice is in words and figures following, to-wit:

97 • • • • • •

NOTICE OF APPEAL BY PLAINTIFF TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The City of Hammond, a municipal corporation, Defendant:

Please take notice that the undersigned, plaintiff in the above entitled cause, hereby appeals from the interlocutory order and decree, and decision, of said United States District Court for the District of Indiana, entered in the above entitled cause on the 21st day of September, A. D. 1925, refusing and denying a preliminary injunction in said cause, to the United States Circuit Court of Appeals for the Seventh Circuit.

Dated at Hammond, Indiana, this 14th day of October, A. D. 1925.

A. J. WHINERY,
Attorney for Plaintiff.

We hereby acknowledge notice of the foregoing notice of appeal in the above entitled cause this 14th day of October, A. D. 1925.

W. W. MCMAHON, *City Atty.,*
Attorney for Defendant,
City of Hammond.

98 And, also, on said 15th day of October, A. D. 1925, the said plaintiff filed in the office of the Clerk of said United States District Court for the District of Indiana its petition for appeal to the United States Circuit Court of Appeals for the Seventh Circuit, together with said plaintiff's Assignment of Errors on appeal, which said appeal is then and there allowed by the Honorable Thomas W. Slick, Judge of said Court, presiding in said cause, and which said petition for appeal to the said United States Circuit Court of Appeals for the Seventh Circuit, and the Court's allowance of said appeal, and the Assignment of Errors on such appeal, are in words and figures following, to-wit:

99 • • • • • •

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Thomas W. Slick, Judge of the United States District Court for the District of Indiana:

The above named plaintiff, conceiving itself aggrived by the interlocutory order and decree, made and entered in the above entitled cause on the 21st day of September, A. D. 1925, denying and refusing to grant a temporary injunction in said cause, as prayed for by said plaintiff, does hereby appeal from said interlocutory order and decree to the United States Circuit Court of Appeals for the Seventh Circuit for reasons specified in the Assignment of Errors, which is filed herewith; and said plaintiff prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers, upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

A. J. WHINERY,
Attorney for Plaintiff.

101 • • • • • •

ASSIGNMENT OF ERRORS ON APPEAL.

And, now, on this, the 14th day of October, A. D. 1925, came the above named Schappi Bus Line, Incorporated, a corporation, plaintiff in the above entitled cause, and says, that, the interlocutory order or decree, made and entered herein on the 21st day of September, A. D. 1925, denying and refusing to grant a preliminary injunction against the defendant in this cause, as prayed for by the plaintiff in this cause, is erroneous, and against the just rights of said plaintiff for each of the following reasons, to-wit:

First: Because, as it appears from the record in this cause, plaintiff was entitled to a preliminary injunction in said cause against said defendant, and its application for such interlocutory or preliminary injunction should have been granted as prayed for, and the Judge of said United
102 States District Court for the District of Indiana erred in denying and refusing to grant the same.

Second: Because, as it appears from the record in this cause, the said Judge of said United States District Court for the District of Indiana erred in denying and refusing to grant a preliminary injunction in said cause, as prayed for by plaintiff, so that the statu quo might be maintained, and plaintiff protected from unlawful interference with plaintiff's business by defendant, its agents and servants, until a full and final hearing in said cause might be had in said Court; because it further appeared, by plaintiff's verified complaint filed in said cause, that plaintiff was entitled to the relief prayed for in said complaint, and that plaintiff was without any adequate remedy at law; and, that, plaintiff was suffering irreparable injury by reason of the acts of the defendant, its agents and servants, in unlawfully interfering with plaintiff in the carrying on of its business in the carrying of passengers for hire, and in the conduct of interstate commerce in the carrying of such passengers for hire, and said plaintiff would continue to suffer great injury and irreparable damage during the litigation unless defendant, its agents and servants, were enjoined from continuing such interference with plaintiff, and with the carrying on of plaintiff's business, as alleged in plaintiff's verified complaint, and that defendant was threatening to continue such acts, as alleged,

unless defendant, its agents and servants, were enjoined
103 and restrained from so doing; and it was, therefore, the duty of the said Judge of said Court to grant a temporary injunction against the defendant, enjoining the defendant, its agents and servants, from interfering with plaintiff, and with the carrying on of plaintiff's business, during the litigation, and until a final hearing in said cause could be had.

Third: Because, as it appears from the record in this cause, plaintiff had obtained, from the Public Service Commission of Indiana, Certificates of Public Convenience and Necessity, authorizing plaintiff to engage in the carrying of passengers for hire as a common carrier, by means of motor busses, on, and upon, and over certain public highways in the State of Indiana, and upon, and over certain public highways in the State of Indiana and leading to, and connecting with, other public highways in the State of Illinois; and, that, as such common carrier of passengers for hire, plaintiff was engaged, as a common carrier, in furnishing motor bus service in the carrying of passengers between the states of Indiana and Illinois, and more particularly between Calumet City, Illinois, and the City of Hammond, Indiana, and the City of East Chicago, Indiana, and between the City of Hammond, Indiana, and the City of Chicago, Illinois; and, that, plaintiff had been duly authorized, by the Public Service Commission of Indiana granting the Certificates of Public Convenience and Necessity, authorizing plaintiff to so operate its motor vehicles in the carrying of such passengers for hire over
104 the public highways in the State of Indiana, and within the City of Hammond; yet, notwithstanding, as it further appears from the record in this cause, the said defendant City of Hammond undertook, unlawfully, to prevent plaintiff from so carrying on its business in the carrying of passengers for hire within the State of Indiana over said public highways, where the Public Service Commission of Indiana had granted such Certificates of Public Convenience and Necessity; and, also, said defendant City of Hammond undertook to prohibit and prevent plaintiff from carrying passengers for hire while engaged in interstate commerce in the carrying of passengers from Calumet City in Illinois to the cities of Hammond and East Chicago in the state of Indiana, and in the carrying of passengers from Hammond, Indiana, to the City of Chicago, Illinois; all of which acts of said defendant, City of Hammond, were in direct violation of plain-

tiff's rights, as guaranteed to it by Clause 1 of the 14th Amendment to the United States Constitution, wherein it is provided, that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person, within its jurisdiction, the equal protection of the laws."

And, likewise, in violation of Section 8 of Article 1 of the United States Constitution, providing that, the jurisdic-
105 tion over interstate commerce, or commerce among the several states, shall be exclusive in the Congress of the United States.

Fourth: Because, as it appears from the record in this cause, the defendant, City of Hammond, unlawfully discriminated against this plaintiff in the carrying on of its business, in the carrying of passengers for hire as a common carrier, in the conduct of interstate commerce within the states of Illinois and Indiana, in violation of Article 4, Paragraph 2, Clause 1, of the United States Constitution; and, likewise, in violation of Section 1 of the 14th Amendment to the United States Constitution.

Fifth: Because, as it appears from the record in this cause, the defendant, City of Hammond, unlawfully undertook to prohibit and forbid plaintiff from carrying on its business, as a common carrier of passengers for hire, in the conduct of interstate commerce between the states of Illinois and Indiana, in violation of the "Commerce Clause" of the United States Constitution, to-wit: Article 1, Section 8.

Sixth: Because, as it appears from the record in this cause, the defendant, City of Hammond, unlawfully undertook to prohibit plaintiff from carrying on a lawful business in the carrying of passengers for hire, as a common carrier, over the public highways of the State of Indiana, notwithstanding that plaintiff had obtained, from the Public
106 Service Commission of Indiana, Certificates of Public Convenience and Necessity, as required by the laws of said State, authorizing said plaintiff so to do; which unlawful acts of said defendant, City of Hammond, as it appears from the record in this cause, were in contravention of the natural rights of plaintiff, and all individuals engaged in a similar business of carrying passengers for hire.

Seventh: Because, as it appears from the record in this cause, the said United States District Court for the District

of Indiana, erred in refusing to enjoin the enforcement of the City Ordinance of the City of Hammond, set out at length in plaintiff's verified complaint in this action, being Ordinance Number 1945 of the ordinances of said defendant City; because, as it further appears from the record in this cause, said ordinance is invalid, in that, it attempts to make it unlawful for any one to carry passengers for hire, as a common carrier, over the public highways of the State of Indiana, within said City of Hammond, without a license or permit from the Board of Public Works of said City of Hammond, and which said ordinance leaves the granting, or refusal to grant, of such license or permit wholly within the uncontrolled and arbitrary discretion of said Board of Public Works, without prescribing any uniform rules or provisions governing the obtaining of such license or permit, but leaving the power to grant one person such a license or permit and to refuse another, under the same circumstances; and which said ordinance is invalid as being in violation of Section 23, Article 1, of the Indiana Constitution; and, likewise, in violation of Section 1 of the 14th Amendment to the United States Constitution; and, likewise, in violation of Clause 1, Section 2 of Article 4 of the United States Constitution.

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Eighth: Because, as it appears from the record in this cause, the said United States District Court, for the District of Indiana, erred in refusing to enjoin the enforcement of the ordinance, set out at length in plaintiff's verified complaint in this action, being Ordinance Number 1945 of the ordinances of said defendant City, which said ordinance is unconstitutional and void for indefiniteness and uncertainty, in that, it prescribed no rule governing the granting or refusing of a license or permit by the Board of Public Works of said City, and attempted to give to the Board of Public Works of said defendant City an uncontrolled, arbitrary discretion to grant one person a license or permit, and to refuse another, under the same circumstances.

Ninth: Because, as it appears from the record in this cause, the said United States District Court, for the District of Indiana, erred in refusing to enjoin the enforcement of the ordinance, set out at length in plaintiff's verified complaint in this action, being Ordinance Number 1945 of the ordinances of said defendant City, notwithstanding that said ordinance is unlawful, unconstitutional, and void, in that, it attempts to prohibit and place an undue burden upon interstate commerce, in contravention of Section 8 of Article 1 of the United States Constitution.

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Tenth:—Because, as it appears from the record in this cause, the defendant, City of Hammond, unlawfully discriminated against this plaintiff in the carrying on of its business, in the carrying of passengers for hire as a common carrier, in the conduct of interstate commerce between the states of Illinois and Indiana, in this, that it permitted other carriers of passengers for hire to pass over the same public highways in said City, to stop thereon to let off and take on passengers; and, yet, undertook to prohibit and forbid, and did prohibit and forbid, this plaintiff from either passing over said same public highways in said City of Hammond, or from stopping thereon to let off or take on passengers, which passengers plaintiff was then and there carrying as passengers for hire, as a common carrier, in the conduct of interstate commerce between said states of Illinois and Indiana; all in violation of the "Commerce Clause" of the United States Constitution, to-wit: Article 1, Clause 8, and, likewise, in violation of Article 4, Paragraph 2, Clause 1, of the United States Constitution; and, likewise, in violation of Section 1 of the 14th Amendment to the United States Constitution, and notwithstanding that plaintiff had then and there obtained, from the Public Service Commission of the State of Indiana, as required by law, Certificates of Public
109 Convenience and Necessity, duly authorizing it to act as a common carrier in the carrying of such passengers for hire by motor vehicles over said same public highways in said State of Indiana.

Eleventh: Because, as it appears from the record in this cause, the said United States District Court, for the District of Indiana, erred in refusing to enjoin the enforcement of the ordinance, set out at length in plaintiff's verified complaint in this action, being Ordinance Number 1945 of the ordinances of said defendant City, notwithstanding that said ordinance is unreasonable, unlawful, unconstitutional, and void, in that, it authorizes and directs the Board of Public Works of said City of Hammond to arbitrarily deny to plaintiff permission to operate its motor busses in the carrying of passengers for hire, as a common carrier, over the public highways within said City of Hammond, notwithstanding that plaintiff was then and there authorized, by Certificates of Public Convenience and Necessity, issued to plaintiff by the Public Service Commission of Indiana, so to do, and which said ordinance, so authorizing the Board of Public Works of said City of Hammond to thus arbitrarily deny

plaintiff such permission to operate its motor bus lines over said public highways, thereby deprives plaintiff of its property without due process of law, in contravention of Section 1 of the 14th Amendment to the United States Constitution; that, all sections, and provisions, and portions, of said ordinance aforesaid are so mutually connected with, and de-
110 pendent upon, the unreasonable and invalid portions that the entire ordinance is invalid, unreasonable, and void.

Twelfth: Because, as it appears from the record in this cause, the said United States District Court, for the District of Indiana, erred in refusing to enjoin the enforcement of the ordinance, set out at length in plaintiff's verified complaint in this action, being Ordinance Number 1945 of the ordinances of said defendant City of Hammond, notwithstanding that said ordinance is void because it is in excess of the powers given to said defendant, City of Hammond, in the following respects, to-wit:—

That the control of the operation of motor vehicles, transporting passengers for hire upon public highways in the State of Indiana, including streets within the limits of municipal corporations in said State, is exclusively within the jurisdiction of the Public Service Commission of Indiana, under, and by virtue of, an Act of the General Assembly of said State, approved March 4, 1925, and the Acts to which said Act is supplemental;

That by Section 5 of said Act of March 4, 1925, it is provided that in any city or town of the State of Indiana, where motor transportation is furnished under or by color of a contract, and in cities or towns contiguous thereto, the Board of Public Works, Common Council, or Board of Trustees, as the case may be, shall continue to supervise, control, and regulate such service, and to determine when, if at all,
111 for public convenience and necessity, competing service shall be established; that said proviso, thus attempting to exempt such cities from the jurisdiction and control of the Public Service Commission, is invalid, in this, that: it attempts to create, and does create, an arbitrary classification of cities and towns within said State, not bearing any reasonable or just relation to the subject matter of said Act in respect to which the proposed classification is made; that said proviso in said Section 5 of said Act attempts to make, and does make, the cities and towns affected thereby, the subjects of local and special regulation, in direct contravention of Sections 22 and 23 of Article 4 of the Constitution

of the State of Indiana; that said proviso of said Section 5 is discriminatory, and does not apply equally to all cities and towns naturally falling within the same classification, and attempts to grant privileges and immunities to such cities and towns, and to the inhabitants thereof, not granted to all citizens, and thereby contravenes Section 1 of the 14th Amendment to the United States Constitution;

That said proviso in Section 5 of said Act of March 4, 1925, is separate and divisible from the remaining portions and sections of said Act, and is not within the title of said Act, and is, therefore, unconstitutional and void, in that, it violates Section 19 of Article 4 of the Indiana Constitution, which requires, that:

"Every act shall embrace but one subject and matters
112 properly connected therewith, which subject shall be expressed in the title."

Thirteenth: Because, as it appears from the record in this cause, the said United States District Court, for the District of Indiana, erred in refusing to enjoin the enforcement of the ordinance, set out at length in plaintiff's verified complaint in this action, being Ordinance Number 1945 of the ordinances of said defendant City, notwithstanding that it, likewise, appears from the record in this cause, that, said defendant City discriminates against this plaintiff by enforcing said ordinance against this plaintiff, and not against the Calumet Motor Coach Company; that such ordinance, and such actions of said defendant, City, under said ordinance, is discriminatory against plaintiff, and grants to the said Calumet Motor Coach Company privileges and immunities, which, upon the same terms, are not granted to plaintiff, which ordinance and action of said defendant City are in contravention of Section 23, Article 1 of the Constitution of Indiana; that the enforcement of said ordinance against this plaintiff, and not against the Calumet Motor Coach Company, which company is engaged in like business with the plaintiff, upon the self-same streets of the City of Hammond, denies to plaintiff the equal protection of the laws, and deprives plaintiff of its property without due process of law, in contravention of Section 1 of the 14th Amendment to the United States Constitution; that said ordinance excludes, by the terms of Section 1 thereof, all motor vehicles transporting passen-
113 gers for hire entirely from the streets of said City of Hammond named in said Section 1, and said ordinance deprives such carriers by motor vehicles of the right to stop

to receive, or discharge, passengers on any of the streets of the City except under permits granted by the Board of Public Works of said City on certain streets named in Section 2; but the third section of said ordinance provides that said ordinance shall not be construed to impair the obligation of any contract to which the said City is a party; that said City of Hammond is, as shown by the record in this cause, a party to an alleged franchise or contract with said Calumet Motor Coach Company; and, under color of such alleged franchise, and the provisions of said ordinance, said defendant City permits said Calumet Motor Coach Company, without hindrance, to carry on the self-same business in the carrying of passengers for hire, over the public highways within the said City, while, at the same time, prohibiting plaintiff from doing a like business; that said defendant, City of Hammond, enforces each and all of the provisions of said ordinance against plaintiff, and not against said Calumet Motor Coach Company; that such action of said defendant City is an unlawful discrimination against plaintiff; and, by the interpretation which the defendant City thus places upon said ordinance, renders the same invalid, unreasonable, arbitrary, unconstitutional, and void.

Fourteenth: Because, as it appears from the record in
114 this cause, the said United States District Court, for the District of Indiana, erred in refusing to enjoin the enforcement of the ordinance, set out at length in plaintiff's verified complaint in this action, being Ordinance Number 1945 of the ordinances of said defendant City, in this, that, as it likewise appears from the record in this cause, the principal business in which plaintiff is engaged is interstate commerce, in the carrying of passengers for hire between the City of Chicago, Illinois, and the City of Hammond, Indiana, and the said ordinance prohibits plaintiff from carrying on such business within the defendant, City of Hammond, in direct contravention of Section 8, Article 1, of the United States Constitution.

Fifteenth: Because, as it appears from the record in this cause, the said United States District Court, for the District of Indiana, erred in refusing to enjoin the enforcement of the ordinance, set out at length in plaintiff's verified complaint in this action, being Ordinance Number 1945 of the ordinances of said defendant City, in this, that: said ordinance shows, upon its face, that it was not passed by said defendant City with a view to safety or conservation of the

highways, nor as a regulation as to the manner of use of the highways; but, instead, that it was passed for the sole purpose of prohibiting competition with the said Calumet Motor Coach Company and others operating under some color of contract with said defendant City; that said ordinance prohibits the use of the public highways in said
115 City to the plaintiff while permitting the Calumet Motor Coach Company, and others, to use said public highways for the same purpose, and in the same manner; and said ordinance leaves it to the arbitrary determination of the Board of Public Works of said City whether the prohibition therein contained shall be applied, and to whom it shall be applied, without furnishing any uniform rule for such determination; and said ordinance further prohibits the use of the public highways within said City by persons engaged in interstate commerce, such as plaintiff, without the permit from said Board of Public Works, and prohibits the use of said public highways in said City, even for persons engaged in interstate commerce, such as plaintiff, except in a limited district, north of 122nd Street and east of Calumet Avenue, which restriction prohibits plaintiff from entering, or passing over the public highways within all of the principal portions of said City; and, in fact, prohibits plaintiff, while engaged in interstate commerce, from receiving or letting off passengers within a distance of approximately four (4) miles of the business center of said defendant City of Hammond.

Wherefore, the said plaintiff prays that said interlocutory order or decree, denying and refusing to grant a preliminary injunction in said cause, may be in all things reversed, and that said United States District Court, for the District of Indiana, may be directed to grant a preliminary injunction in said cause against said defendant, City of Hammond,
116 its agents, servants, and employees, as prayed for in plaintiff's verified Bill of Complaint, and for all other proper and further directions and relief to which plaintiff may be entitled in equity.

W. J. WHINERY,
Attorney for Plaintiff.

100 The foregoing claim of appeal is allowed this 15th day of October, A. D. 1925.

THOMAS W. SLICK,
Judge, United States District Court for the District of Indiana.

117 And, also, on said 15th day of October, A. D. 1925, the said plaintiff filed in the office of the Clerk of said Court its appeal bond on said appeal to the United States Circuit Court of Appeals, for the Seventh Circuit, with the United States Fidelity & Guaranty Company as surety thereon, after said appeal bond had been duly approved by the Honorable Thomas W. Slick, Judge of said Court, presiding, and which said appeal bond, and the Court's approvel thereof, is in words and figures following, to-wit:—

118 * * * * * *

APPEAL BOND.

Know All Men by These Presents, That: Schappi Bus Line, Incorporated, a corporation, as Principal, and the United States Fidelity & Guaranty Company, a corporation, as Surety, are held and firmly bound to the City of Hammond, a municipal corporation, in the penal sum of One Thousand ($1000.00) Dollars, to be paid to said City of Hammond, and for the payment of which, well and truly to be made, we bind ourselves, our representatives, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of October, A. D. 1925.

The condition of the above obligation is such, that, Whereas: On the 21st day of September, A. D. 1925 said Schappi Bus Line, Incorporated, a corporation, the plaintiff in the above entitled cause, was denied a preliminary injunction against the said defendant, City of Hammond, in the
119 above entitled cause in said United States District Court for the District of Indiana, and from which interlocutory order and decree, denying and refusing to grant said preliminary injunction, the said plaintiff has appealed to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, if the said Schappi Bus Line, Incorporated, a corporation, plaintiff in said cause as aforesaid, will duly prosecute its said appeal to effect, and abide by and pay all damages and costs, if any, which may be rendered or affirmed

against it in said cause on such appeal, then this obligation to be void, otherwise to be and remain in full force and effect.

SCHAPPI BUS LINE, INCORPORATED,
By: HENRY SCHAPPI (Seal)
President.
Principal.

Attest:
HENRY SCHAPPI, JR.,
Secretary.
UNITED STATES FIDELITY & GUARANTY CO.,
FRANK HAMMOND (Seal)
Its Resident Agent
Surety.

The foregoing appeal bond is approved as to form, amount, and sufficiency of surety, this 15th day of October, A. D. 1925.

THOMAS W. SLICK,
Judge of the United States District Court for the District of Indiana.

93 And, also, on said 15th day of October, A. D. 1925, the said plaintiff filed in the office of the Clerk of said Court a signed waiver of the defendant, City of Hammond, a municipal corporation, waiving the provisions of Rule 75, Rules in Equity, relating to the preparation of the transcript of the record and the statement of evidence in this cause, which said waiver is in words and figures following, to-wit:—

94 * * * * * *

WAIVER OF PROVISIONS OF RULE 75, RULES IN EQUITY, BY DEFENDANT.

The plaintiff in the above entitled cause, having prepared and submitted to the attorneys for the defendant a statement of the record, and a transcript or statement of the evidence in the above entitled cause on the hearing for preliminary injunction, and the defendant, through its solicitors and attorneys, having examined same, do hereby waive the provisions in Rule 75 of the Equity Rules, the provision for the filing of praecipe, indicating the portions of the record to be incorporated into the transcript on such appeal, and that such statement of the evidence shall be lodged in the office of the Clerk for a period of ten (10) days; and hereby con-

sent to the approval of such statement of the evidence by the Judge of the United States District Court for the District of Indiana, and the filing of the same thereof in the Clerk's
95 office of said Court, to be embodied as a part of the record in said cause, for the purpose of appeal.

W. W. McMahon,
City Attorney,
Attorneys for Defendant, City of Hammond.

Dated this 14th day of October, A. D. 1925.

123 And afterwards, to-wit:—On the 16th Day of October, A. D. 1925, the following further proceedings were had and entered of record in this cause, to-wit:—

* * * * * *

Comes now the plaintiff, Schappi Bus Line, Incorporated, a corporation, and gles herein its written praecipe for a transcript of the proceedings and record in this cause, to be used on appeal to the United States Circuit Court of Appeals for the Seventh Circuit, together with the acknowledgment of receipt of copy of same by the defendant, which said praecipe and acknowledgment of service of same is in these words, to-wit:—

124 * * * * * *

t. 16, PRAECIPE FOR TRANSCRIPT OF RECORD AND STATEMENT OF EVIDENCE, ETC., TO BE USED ON APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: William P. Kappes, Clerk of United States District Court for the District of Indiana:—

You are hereby requested to prepare and certify a full, true, and entire transcript of the proceedings and record in the above entitled cause, and to include therein all orders and entries, all papers and pleadings filed, and on file, all order book entries and rulings, the statement of evidence or the bill of exceptions containing the evidence, and the interlocutory order or decree denying a preliminary injunction, en-

tered in said cause on the 21st day of September, A. D. 1925, and all other papers, documents, and record necessary to make a complete transcript of the proceedings and record in said cause filed, and on file, in your office, to be used on appeal to the United States Circuit Court of Appeals for the Seventh Circuit, including in said transcript each of the following papers, pleadings, and orders, to-wit:—

125 (1). Plaintiff's verified complaint filed in said cause, which was also introduced in evidence as Plaintiff's Exhibit 1 on the hearing for a temporary injunction.

(2). Plaintiff's motion for a preliminary injunction.

(3). Defendant's answer to plaintiff's verified complaint, which answer was also introduced in evidence as Plaintiff's Exhibit 2.

(4). All orders and entries made in said cause relating to the hearing for a temporary injunction, together with the interlocutory order entered on the 21st day of September, A. D. 1925, denying such temporary injunction.

(5). The statement of the evidence, or bill of exceptions, as approved by the Judge of said Court, and filed in said cause.

(6). The waiver of defendant of the provisions of Rule 75 In Equity as to the preparation of transcript and statement of the evidence for appeal.

(7). The notice given by plaintiff to defendant of the appeal, with acknowledgement of service of same.

(8). Plaintiff's petition for appeal, and the allowance of same by the Judge.

(9). The Assignment of Errors.

(10). The appeal bond.

(11). A copy of this praecipe together with the acknowledgement of receipt of copy of same by defendant.

(12). The citation to the defendant on this appeal, together with the acknowledgement of service of same.

126 And you are requested to prepare said transcript, and duly certify to the same, to be used as the transcript of the record on appeal from said interlocutory order or decree denying and refusing to grant a temporary injunction in the above entitled cause to the Circuit Court of Appeals of the United States, for the Seventh Circuit.

Dated this 16th day of October, A. D. 1925.

W. J. WHINERY
Attorney for Plaintiffs.

The defendant, City of Hammond, a municipal corporation,

in the above entitled cause, by its attorneys of record in said cause, hereby acknowledges service of a copy of the foregoing praecipe, and waives all the provisions of Rule 75 In Equity, relating to the preparation of the record and statement of the evidence, to be used on appeal, for the reason that heretofore plaintiff's counsel has prepared, and furnished to counsel for the defendant, a copy of the record and statement of the evidence for examination, and which has been approved by the attorneys for the defendant, for use on such appeal.

Dated this 16th day of October, A. D. 1925.

WM. W. MCMAHON
Attorney for Defendant.

127 * * * * * *

CERTIFICATE OF CLERK TO TRANSCRIPT.

I, William P. Kappes, Clerk of the United States District Court, in and for the District of Indiana, do hereby certify and return to the claim of appeal of the plaintiff, Schappi Bus Line, Incorporated, a corporation, in a cause pending in said Court, wherein the said Schappi Bus Line, Incorporated, a corporation, is plaintiff, and the City of Hammond, a municipal Corporation, is defendant, that the above and foregoing is a full, true, and complete transcript and copy of the record, and of all papers filed, and proceedings had and entered in said cause, as the same appear on file, and of record, in my office; that I have compared the same with the originals, and they are true, and correct transcripts therefrom, and of the whole thereof, all as required by the above and foregoing praecipe.

In Testimony Whereof I have hereunto set my hand
128 and affixed the seal of said Court at Hammond in said District this 16th day of October, A. D. 1925, and of the Independence of the United States of America, the 149th.

WILLIAM P. KAPPES,
(Seal) *Clerk of the United States District Court for the District of Indiana.*
By MAUDE B. SWANK,
Deputy Clerk.

Cost of transcript $61.35. Paid by plaintiff 10/16/25.

MAUDE B. SWANK,
Deputy Clerk.

120 And afterwards, to-yit:—On the 16th day of October, A. D. 1925, the following further proceedings were had and entered of record in this cause, to-wit:—

* * * * * *

Comes now the plaintiff, Schappi Bus Line, Incorporated, a corporation, and gles herein the citation to the City of Hammond, defendant herein, issued by the Judge of said Court on the 15th day of October, A. D. 1925, together with the acknowledgement of service of said citation upon said defendant, City of Hammond, a municipal corporation, on said day, which citation and acknowledgement of service of same is in these words and figures, to-wit:—

121 * * * * * *

CITATION TO CITY OF HAMMOND, DEFENDANT.

To the City of Hammond, a municipal corporation, Defendant in the above entitled cause, Greeting:—

Whereas, Schappi Bus Line, Incorporated, a corporation, plaintiff in the above entitled cause, has lately appealed to the United States Circuit Court of Appeals for the Seventh Circuit from an interlocutory decree, denying a preliminary injunction to said plaintiff against you in the above entitled cause, which interlocutory order and decree was lately rendered in the United States District Court for the District of Indiana, and which interlocutory order and decree, denying said injunction, was, by said Court, made in your favor; and the said Schappi Bus Line, Incorporated, a corporation as aforesaid, has filed the security required by law, and the orders of said Court, together with its petition for an ap-
122 peal, and Assignment of Errors, and which appeal has been allowed,—you are, therefore, hereby cited to be and appear before the said United States Circuit Court of Appeals for the Seventh Circuit at the City of Chicago, State of Illinois, on the 9th day of November, A. D. 1925 next, there to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of Hammond in the said District of Indiana this 15th day of October, A. D. 1925.

THOMAS W. SLICK,
Judge of the United States District Court for the District of Indiana.

We hereby acknowledge service of the foregoing citation for, and on behalf of, the said defendant, City of Hammond, a municipal corporation, this 16th day of October, A. D. 1925.

WM. W. MCMAHON,
Attorney for Defendant, City of Hammond, a municipal corporation.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 94, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed November 2, 1925, on which the following entitled cause was heard and determined:

Schappi Bus Line, Incorporated

vs.

City of Hammond, a Municipal Corporation

No. 3668, October Term, 1925, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this First day of April A. D. 1926.

EDWARD M. HOLLOWAY,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago in said Seventh Circuit on the sixth day of October, 1925, of the October term in the year of our Lord one thousand nine hundred and twenty-five and of our Independence the one hundred and fiftieth.

And afterwards, to wit: On the seventeenth day of October, 1925, there was filed in the office of the clerk of this court an appearance of counsel for appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

No. 3668 October Term 1925.

Schappi Bus Line, Incorporated

—*vs*—

City of Hammond

The Clerk will enter my appearance as counsel for the plaintiff in error Schappi Bus Line, Incorporated.

WM. J. WHINERY
Hammond, Indiana.

Endorsed: Filed Oct. 17, 1925. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-third day of October, 1925, there was filed in the office of the clerk of this court an appearance of counsel for appellee, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

No. 3668 October Term 1925.

Schappi Bus Line, Incorporated

Appellant

vs.

City of Hammond

Appellee

The Clerk will enter my appearance as Counsel for the Appellee.

GLENN D. PETERS
200 Ruff Bldg.
Hammond, Indiana.

BOMBERGER PETERS & MORTHLAND
Of Counsel.

Endorsed: Filed Oct. 23, 1925. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-eighth day of October, 1925, there was filed in the office of the clerk of this court an "Original Citation", which said citation is not copied here as the same appears in the Printed Record certified herewith, on pages 93 and 94.

And afterwards, to wit: On the fourteenth day of December, 1925, the following further proceedings were had and entered of record, to wit:

Monday, December 14, 1925.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.

Schappi Bus Line, Inc.
3668 —*vs*—
City of Hammond, *et al.*
} Appeal from the District Court of the United States for the District of Indiana.

On motion of Mr. W. J. Whinery, counsel for appellant, it is now here ordered that this cause be, and the same is hereby set down for hearing on Tuesday, January 12, 1926.

And afterwards, to wit: On the twenty-fourth day of December, 1925, the following further proceedings were had and entered of record, to wit:

Thursday, December 24, 1925.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Schappi Bus Line, Inc.
3668 —*vs*—
City of Hammond, etc.
} Appeal from the District Court of the United States for the District of Indiana.

It is ordered by the court that this cause be, and the same is hereby re-set for hearing on Tuesday, January 26, 1926.

And afterwards, to wit: On the twenty-sixth day of January, 1926, the following further proceedings were had and entered of record, to wit:

Tuesday, January 26, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.

Schappi Bus Line, Incorporated,
3668 —*vs*—
City of Hammond, etc.

} Appeal from the District Court of the United States for the District of Indiana.

Now this day come the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. William J. Whinery, counsel for appellant, and by Mr. L. L. Bomberger, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to wit: On the twelfth day of March, 1926, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3668. October Term, 1925, January Session, 1926.

Schappi Bus Line, Incorporated, *Appellant*,
vs.
City of Hammond, a Municipal Corporation, *Appellee*.

Appeal from the District Court of the United States for the District of Indiana.

(March 12, 1926)

Before EVANS, PAGE and ANDERSON, *Circuit Judges*.

Opinion by PAGE, *Cir. J.*

Appellant, incorporated under the laws of the state of Indiana, operates three bus lines, for each of which it has a certificate of public convenience and necessity from the Public Service Commission of Indiana. With the first line, it does a purely interstate business from 63rd and South Park Avenue, in the city of Chicago, Illinois, into appellee, a city of Indiana. The second line does business between Calumet City, Illinois, to and through appellee, and through a part of East Chicago, Indiana. The third line operates over public highways within appellee. All requirements of the laws of the state of Indiana were complied with.

Appellant's bill for injunction, to restrain appellee from interfering with the operation of its busses, was dismissed. The interference consisted of twenty or thirty arrests of appellant's chauffeurs on one charge and another, but all based on alleged violations of appellee's Ordinance No. 1945. The interference consisted, also, in the exclusion of certain of appellant's busses from certain streets altogether, and of preventing them from stopping anywhere within several miles of the business center of appellee for the purpose of loading and unloading passengers in the street.

Appellee admits the charge of interference, and insists that its acts will be repeated as often as necessary to prevent the operation of appellant's busses contrary to the provisions of appellee's said ordinance No. 1945, upon which it wholly relies for justification of its acts. It does not claim that any other rule, regulation, ordinance or provision is violated by appellant. The ordinance reads:

"An Ordinance Regulating and Routing Certain Vehicles for Hire and Prohibiting Their Use of Certain Streets Within the City of Hammond.

"Section 1. Be It Ordained by the Common Council of the City of Hammond, Indiana, that in order to promote public safety and order and to diminish the congestion of vehicular travel within said City, from and after the taking effect of this Ordinance, it shall be unlawful for any person, firm, or corporation owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon, or over any of the following parts of streets within said City of Hammond, to-wit:—

On Hohman Street from Russell Street to Michigan Avenue;

On State Street from Morton Court to Calumet Avenue;

On Sibley Street from the easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company where the same crosses Sibley Street westerly to Morton Court;

On Fayette Street from Hohman Street to Oakley Avenue.

"Section 2. From and after the taking effect of this Ordinance, it shall be unlawful for any person, firm, or corporation, owning or operating any motor vehicle carrying passengers for hire, to stop such vehicle for the purpose of receiving or discharging passengers upon any street, alley, or other public place within said City; provided, that the Board of Public Works may, for any period not exceeding six months or successions thereof, permit such operation on any or all of the following designated parts of streets: Columbia Avenue between the South city limits and the right-of-way of the Michigan Central Railroad where the same crosses said Columbia Avenue: Sibley Street from Columbia Avenue to the Easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company; State Line Street from its Southerly terminus to its Northerly terminus at or near the right-of-way of said Michigan Central Railroad aforesaid; Rimbach Avenue from State Line Street to Ann Street; Ann

Street from Rimbach Avenue to Russell Street; Russell Street from Ann Street to State Line Street, and for vehicles engaged strictly in interstate commerce any street or other public place North of 122nd Street and East of Calumet Avenue.

"Section 3. Whoever violates any of the provisions of Sections 1 and 2 of this Ordinance shall, upon conviction, be fined in any sum not exceeding Fifty ($50.00) for each and every offense, but nothing in this Ordinance shall be construed to impair the obligation of any contract to which the City is a party under which such motor vehicles are now operated for hire within said City. Nothing herein shall apply to taxicabs.

"Section 4. This Ordinance shall supplement such ordinances as are now in force, and repeal only so much of them or any part thereof as may be in direct conflict herewith."

While it is not expressly conceded that the following language in Section 3, "Nothing in this ordinance shall be construed to impair the obligation of any contract to which the city is a party under which such motor vehicles are now operated for hire within said city" was inserted for the express purpose of exempting the Calumet Motor Coach Company from compliance with the ordinance, yet it is conceded that that concern comes within the terms of that provision. It operates something like twenty motor busses for the carriage of passengers between the city of Chicago and appellee, and so far as operation within the corporate limits of appellee is concerned, operates under a contract to which appellee is a party. The Calumet Motor Coach Company has never been required to observe or comply with the terms of the ordinance, but has been permitted to and does use, without let or hinderance from appellee and the officials of appellee, the streets mentioned in Section 1, and to load and unload passengers in all of the streets where it operates at will, as appellee claims it has the right to do, and as appellee claims it had and has the right to authorize the Calumet Motor Coach Company to do.

There are several reasons why we are of opinion that the bill should not have been dismissed, but we deem it necessary to consider but one.

Without conceding the right of the city, in any event, to control the operation of motor busses under its police power, since the passage of the Moorhead Act and the Registration and Licensing Act, being Chapters 46 and 213 of the 1925 Acts of the Indiana General Assembly, we are of opinion that

the ordinance cannot be sustained as a police regulation,—and it is not claimed that it can be sustained upon any other theory. As the ordinance is drawn, there must be read into both Sections 1 and 2 the language of Section 3 above quoted, that is, after saying in Section 1 that it shall be unlawful to run on, upon, or over Hohman, State, Sibley and Fayette Streets, there must be read, "but nothing in this ordinance shall be construed to impair the obligation of any contract to which the city is a party under which such motor vehicles are now operated for hire within said city." The same must be the reading with reference to Section 2. Even police regulations must be fair and reasonable for all citizens alike, so far as may be, and without discrimination. The ordinance in question does not respond to these requirements. By its terms, it permits some concerns to do the identical things from the doing of which appellee claims it has the right, under the ordinance, to exclude appellant. Though not so written in the ordinance, the fair intendment of the whole record is that the ordinance was written not only for the purpose of permitting that condition of things, but for the purpose of enforcing it.

We are of opinion that the record does not show any valid reason for the passage of such an ordinance because of congestion in the streets. The record shows that there was a parking privilege on both sides of the streets in question of not less than an hour's limit, very generally availed of. It is a great strain upon the imagination to find justification for an ordinance excluding appellant from appellee's streets when, at the same time, unused vehicles are permitted to be parked for an hour at a time on both sides of the street and the Calumet Motor Coach Company is permitted to do all the things prohibited to appellant in the same streets. The record shows that one Clarence E. Dome, one of the appellant's chauffeurs, was prosecuted under said ordinance in the City Court of appellee, wherein the validity of the ordinance was put directly in issue, the City Court holding that the ordinance was unreasonable, illegal and void, as being in violation of the law of the land and the Constitution of the state of Indiana.

It was urged in oral argument that the contract between appellee and Calumet Motor Coach Company, by which the latter was permitted to operate, in the manner specified in that contract, in appellee's streets was a matter of no concern to appellant,—that appellee had the right to make such a con-

tract with one and to refuse to make it with another, or to refuse to make a contract at all except upon other and different terms. In the abstract, that probably is true, but the right to make such a contract, or to make it with one and not with the other, must not be confused with the obligation of appellee, when it undertook, in the exercise of its alleged police powers, to pass an ordinance to regulate traffic, to pass one that did not discriminate. It could not make its contract with the Calumet Motor Coach Company an excuse for not making that concern subject to the terms of the ordinance. If it had such police powers as it undertook to exercise, it had no right to barter them away to the Calumet Motor Coach Company.

We are of opinion that, for the reasons stated, the ordinance is illegal and void and the acts of appellee without justification, and that the decree of the District Court should be reversed, with directions to enter a decree granting the injunction.

And on the same day, to wit: On the twelfth day of March, 1926, the following further proceedings were had and entered of record, to wit:

Friday, March 12, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.

Schappi Bus Line, Incorporated,
3668 —*vs*—
City of Hammond, a municipal corporation.

Appeal from the District Court of the United States for the District of Indiana.

This cause coming on to be heard on the transcript of the record from the District Court of the United States for the District of Indiana and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter a decree granting the injunction.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 97 to 106, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of

Schappi Bus Line, Incorporated

vs.

City of Hammond, a Municipal Corporation

No. 3668, October Term, 1925, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this First day of April, A. D. 1926.

EDWARD M. HOLLOWAY,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4176)

FILED
OCT 6 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

NO. 67

CITY OF HAMMOND, LAKE COUNTY, INDIANA,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

SCHAPPI BUS LINE, INCORPORATED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

C. B. TINKHAM,
LOUIS T. MICHENER,
GERALD GILLETT,
Attorneys for Petitioner.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1927.

No. 67

CITY OF HAMMOND, LAKE COUNTY, INDIANA,
A MUNICIPAL CORPORATION,
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vs.

SCHAPPI BUS LINE, INCORPORATED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.*

To the Honorable the Justices of the Supreme Court of the United States:

Petitioner desires to present to this court an additional argument supplementing the short brief and argument presented in connection with the petition for writ of certiorari filed in this cause.

*Note: Throughout this brief and argument, where any quoted words or sentences are italicized the italics are ours unless otherwise noted.

A statement of the grounds on which the jurisdiction of this court is invoked appears in the brief of petitioner filed with the petition for writ of certiorari, beginning on page 10 thereof.

The opinion of the United States circuit court of appeals was filed on March 12, 1926. (R. 101-105.) It is reported in 11 Fed. (2d) 940 (1926).

The appeal taken by respondent to the United States circuit court of appeals, was from the action of the United States district court, in denying a temporary injunction against the enforcement of ordinance 1945. It is apparent from the opinion of the circuit court, however, that that court treated the case as one arising upon an appeal from a final rather than interlocutory order, and decided as a matter of law that the ordinance was invalid. Petitioner in presenting to this court its brief in this cause, has likewise treated the case as an appeal from a final order and omitted any argument which would be applicable only to an interlocutory appeal. This court should not however lose sight of the fact that it must not be assumed that petitioner on final hearing could not show additional reasons for the need of some such regulation as that provided for by ordinance 1945.

STATEMENT OF THE CASE.

This case necessarily involves a determination of the validity of a municipal ordinance and state statutes. The brief statement of the case contained in the petition for a writ of certiorari is inadequate as a foundation for a clear consideration of the merits of the issues involved. We believe that it will materially assist the court if, instead of merely supplementing the statement contained in the petition, we here give a statement of the case.

Whenever a court finds it necesssary to pass upon the construction or the constitutionality of a statute or ordinance,

it is important that the court have before it the situation existing at the time the act was passed and to which the act applies. We deem it important at this point to give the court, concisely, a statement of this situation. We have endeavored to set out only those facts in the record which will be beneficial to this court or needed by it in order to pass intelligently upon the problems of statutory construction and constitutionality.

The city of Hammond is a municipal corporation of the state of Indiana with a population of about 60,000 people. (R. 8, 30.) It is situated in the northwestern part of the state, lies along the Indiana-Illinois state line and is contiguous to the city of Chicago. On the east of Hammond, and contiguous to it, are the cities of Whiting, East Chicago, and Gary, Indiana. All of said cities, including Hammond, border on Lake Michigan and are a part of the extensive industrial territory known as the Calumet region. (R. 8, 56, 62 [map].) Numerous railroads pass through petitioner city, all operating at grade. (R. 54-55, 62 [map].) The central part of the business section is located on Hohman street between Michigan avenue and Rimbach avenue; on State street between Morton court and Sohl street; on Sibley street between Oakley avenue and Morton court, and on Fayette street between Hohman street and Oakley avenue. (R. 54.) The corner of State and Hohman streets has been generally referred to as the principal business corner of the city. (R. 55.) See map in record. (R. 62.)

The center of this business section is cut by four railroads: the double track of the Erie Railroad, the double track of the New York, Chicago and St. Louis Railroad and the single track of the Chicago, Indianapolis & Louisville Railroad, all with contiguous rights of way cutting through Fayette, Sibley, State and Hohman streets in the very heart of this district, and the four tracks of the Michigan Central Railroad intersecting at grade, a block north of State street, the three

other named railroads and Hohman street. The traffic over all these railroads is very heavy, consisting both of passenger and freight traffic. Many hundreds of cars are moved each day across these streets and frequently freight trains of more than a half mile in length are slowly drawn across said streets. (R. 54-55.) See map in record. (R. 62.)

Hohman street, in the main downtown district, is sixty feet in width and has a single street car track in the center; State street, in the district hereinbefore described, is also sixty feet in width and has thereon a double street car track east of Hohman street and a single street car track west of Hohman street. Sibley street, in the district above described, has a double street car track east of Hohman street and a single street car track west of Hohman street. (R. 54.)

As a result of the aforesaid conditions, traffic congestion in the city of Hammond has become a serious and difficult problem. Vehicular traffic on the streets in and adjacent to that part of the business district described is very heavy. (R. 55.) The problem of reducing this congestion is of added difficulty because of the frequent crossing blockades resulting from the operation of the railroads. (R. 56.) For several years prior to 1924 the city suffered the experience of having added to the traffic congestion on its streets a fleet of several hundred jitneys, and experienced the difficulties attendant to, and the added congestion created by, this jitney operation, and particularly by their stopping to load and unload passengers. (R. 55.)

During the year 1924, by ordinance of the city, the jitney business was finally eliminated and thereby congestion somewhat reduced. Shortly thereafter the city entered into a franchise agreement with Calumet Motor Coach Company authorizing and requiring that company to furnish to the city of Hammond, a system of local transportation by motor coach. Thereafter, in November, 1924, the Calumet Motor Coach Company, over fixed routes and on a regular schedule of service, commenced, and has since continued, to furnish

regular public transportation service within the city. (R. 55-7.) After the elimination of the jitneys and the establishment of a local motor bus service under franchise, a large number of other motor busses commenced operating into the city, and engaged in the business of hauling passengers between Hammond and other municipalities. None of these have been authorized by franchise or contract from the city of Hammond, to give a local transportation service. They have operated at times that suited their convenience and almost uniformly into and through the congested business district. They added greatly to the return of the congestion and confusion which existed on the streets of the city prior to the elimination of the jitneys. (R. 55-56.)

On April 25, 1925, the legislature of the state of Indiana amended its public utility laws by declaring that motor coaches operated for hire should be declared public utilities and placing them, subject to certain exceptions, under the jurisdiction of the public service commission of Indiana. This act is commonly known as and will hereafter be referred to as the Moorhead act. (appendix 99-103.) The act provides, however, by section 5 that in towns and cities in which, prior to the date of the act, motor coach service was being given under contract or franchise, and in towns and cities contiguous thereto, the local authorities should "continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service should be established."

This act further provides by section 10 that none of the provisions of the act shall "operate to deprive the state highway commission of Indiana *or any other public authorities* of *any* jurisdiction it or they now has or have or which may hereafter be conferred upon it or them over the public highways of the state,".

At the same legislative session there was enacted a statute providing, in general, regulation for the registration and

licensing of and the use and operation of motor vehicles. Section 45 of this general regulatory act, which is identical with a similar section which was in effect at the time of the enactment of the general regulatory act of 1925, expressly provides that the act shall not be construed as affecting the power of municipalities to make and enforce ordinances, rules and regulations effecting motor driven commercial vehicles used within their limits for public hire. (Acts of Indiana, 1925, c. 213, sec. 45, p. 598. See also Acts of Indiana 1913, c. 300, sec. 17, p. 790.)

In order to relieve the intolerable situation above described, the common council of the city of Hammond, on May 22, 1925, passed ordinance 1945,—a regulatory ordinance dealing with the problem of traffic congestion by controlling and limiting the uses made of the streets by common carrier motor vehicles. (R. 56).

Section 1 of this ordinance prohibits the operation of motor coaches for hire on parts of certain streets, which parts of streets extend from one to four blocks in the heart of the down town business district. (R. 51; 62 [map].)

These parts of streets are as follows:

> Hohman street, from Russell street to Michigan avenue; State street, from Morton court to Calumet avenue; Sibley street, from the easterly line of the Chicago, Indianapolis & Louisville Railway Company, westerly to Morton court; Fayette street, from Hohman street to Oakley avenue.

Hohman street is the main north and south street, and State street is the main east and west street of the city. The intersection of State and Hohman streets is the down town business center. Russell street is three blocks south of State street. Michigan avenue is four blocks north of State street. Morton court is one block west of Hohman street and Calumet avenue is four blocks east of Hohman street, going east on State street. Sibley street is an east and west street and is one block south of State street. The

easterly line of the right of way of the Chicago, Indianapolis & Louisville Railway Company, intersecting Sibley street, is less than a block east of Hohman street. Morton court, intersecting Sibley street, is one block west of Hohman street. Fayette street is an east and west street, one block south of Sibley street, and Oakley avenue intersects Fayette street one block east of Hohman street.

A scrutiny of these intersections (see map R. 62) discloses that section 1 only prohibits busses from passing over those parts of these main streets of the city which are from one block to four blocks distant from the business center of the city. All of these main streets, except these particular portions thereof, and all other streets of the city (except where trucks are forbidden) are open for the passing of motor vehicles of every kind, including busses.

It will be noted that Plummer avenue, an east and west street improved with concrete and not more than a half block north of State street, is entirely open for bus travel; thereby any bus can get practically to the center of the downtown business district by a detour of one block each way from Hohman street; that is to say, to Morton court west of Hohman street, and to Oakley avenue east of Hohman street. Michigan avenue to the north of State street, intersects both Hohman street and Oakley avenue and is improved with concrete. Plummer avenue intersects Morton court.

Section 2 of the ordinance prohibits all busses from stopping on any of the public ways of the city for the purpose of receiving or discharging passengers; but it contains a proviso that the board of public works may grant permits for six months or successions thereof authorizing non-local carriers to stop to receive and discharge passengers on certain streets leading into the central business district (R. 52; 62 [map]). It must be kept in mind that section 2 applies only to the use of the streets as loading zones and does not undertake to prohibit passing over any of the streets of the city.

Ordinance 1945 contains no prohibitions other than those set out in sections 1 and 2. Section 3 permits carriers giving an authorized local transportation service to use the restricted streets.

At the time of the commencement of this suit, respondent in this case was operating motor coaches as a common carrier of passengers for hire over three routes: one between the city of Chicago, Illinois and petitioner city of Hammond, Indiana; one between the city of Calumet City, Illinois and petitioner city of Hammond and East Chicago, Indiana; and the third between petitioner city of Hammond, Indiana and the city of East Chicago, Indiana. (R. 3, 5-6, 7-8). It is important to note that, within the city of Hammond, these routes are almost wholly over streets on which street car tracks are located. (R. 3, 6, 62 [map]).

Each of the two interstate routes, upon crossing the Indiana-Illinois state line into Indiana, is immediately within the limits of petitioner city. (R. 62 [map]). The city of East Chicago, Indiana, lies east of and is contiguous to petitioner city. (R. 56, 62 [map]). Respondent has at no time operated in Indiana except within the city limits of petitioner city of Hammond and a contiguous city. (R. 3-8). No question as to the validity (under the Indiana law) of the ordinance as applied to a carrier running into Hammond from non-contiguous towns, under certificate from the state is therefore pertinent to the case at bar.

Respondent claims the right to carry on both an interstate business, a local business in each of the Indiana cities, and an intercity business between such cities. Its interstate operations are, of course, protected by the commerce clause of the federal constitution from state or municipal regulations unduly burdening such operation. For its local and intercity service in Indiana it relies upon certain certificates received from the public service commission of Indiana, by which the commission purported to authorize operation over these routes. (R. 35-50). These certificates, respondent insists

give it the right to carry on a local business within petitioner city and upon the identical routes over which the Calumet Motor Coach Company operates, and is required and authorized to operate, under its franchise. (R. 3-8, 55).

The city made no attempt to prevent respondent from operating upon any streets in the city except from one to four blocks each way in the congested part of the down town business district. Respondent, however, denied the right of the city to prevent its operation over even these few parts of streets and also the power of the city to prevent its stopping to load and unload passengers on any street in the city. The record does not show that respondent made any attempt to secure from the board of public works of the city a permit to stop to load and unload passengers on any streets in the city. Respondent claims its right so to do without permit, and also claims the right to operate over the prohibited portions of streets in defiance of the municipal regulations. For violation of the city ordinance, the drivers of respondent were arrested. Thereafter respondent sought by injunction to prevent the city from making these arrests. The United States district court denied a temporary injunction and from this order respondent appealed to the United States circuit court of appeals, seventh circuit. That court considered the issues and passed upon the case as though it came up from a final decree. This is clearly shown by the language of the opinion. That court reversed the order of the district court and directed the district court to enter an injunction prohibiting the municipality from enforcing against respondent any of the provisions of ordinance 1945. The circuit court of appeals held invalid as unreasonable the regulations provided for by both section 1 and section 2 of the ordinance. Petitioner city then brought the case to this court by a petition for a writ of certiorari.

As to the interstate business, the argument for respondent against the validity of petitioner's ordinance is necessarily premised upon the contention that the ordinance is prohibited

by and in conflict with the commerce clause; or, if this contention fail, that a state or its municipal agent cannot classify between, or regulate in a different manner, the authorized local city carrier and the interstate carrier. As to the intra-state business, local and intercity, respondent's argument against the ordinance necessarily rests upon the claim that the certificates which it has received from the public service commission of Indiana are valid and that petitioner cannot regulate the use of its streets by a certificated carrier. If the certificates are void, then as to such business respondent has no standing to complain against the ordinance, for it is operating unlawfully in such carrier service. Even if the certificates are valid, respondent must still show that, under the Indiana law, these have the effect of destroying the city's power of regulating the manner of use of its streets.

The opinion of the circuit court of appeals avoids decision on any of these questions except the question of the constitutionality of the ordinance under the fourteenth amendment and the Indiana constitution. That court obviously decided that the equal protection clause of the fourteenth amendment was violated by the ordinance. Apparently, it also thought that the respondent was deprived of property without due process; and it must have had in mind the idea that the local regulation was in conflict with the privilege and immunities section of the Indiana constitution.

In its holding the circuit court was clearly in error. We do not believe that it is difficult to establish the untenability of each of these grounds relied upon by that court to invalidate the ordinance. We are aware, however, that the establishment of such fact does not settle the controversy. It still remains necessary to show that the ordinance does not violate any other constitutional provisions, either of the United States or of the state of Indiana, and that the regulation is within the power possessed by petitioner city under the Indiana law.

In order to avoid confusion, we shall discuss in the following order the legality of ordinance 1945 and show:

I. Ordinance 1945 is not unconstitutional as violative of the fourteenth amendment or of the constitution of the state of Indiana.

II. Ordinance 1945 does not unduly burden or interfere with interstate commerce.

III. Ordinance 1945 is within the power of the city to enact being authorized by the laws of the state of Indiana.

We shall also show the court:

IV. The certificates of public convenience and necessity upon which respondent relies are void. Respondent is illegally operating in intrastate motor bus service in Indiana. No injunction should have been granted protecting these illegal operations of respondent.

ERRORS RELIED UPON BY PETITIONER.

The errors assigned by petitioner in this cause are set out in the brief of petitioner filed with the petition for writ of certiorari, beginning on page seventeen thereof. In asking this court to reverse the decision of the United States circuit court of appeals, seventh circuit, petitioner urges and relies on each of the eight errors there assigned. The argument of petitioner here presented supports the claim made by petitioner as to each error assigned. Point I of this brief presents to this court the arguments of petitioner to sustain its claim of errors as set forth in each of the assignments made. Points II and III of this brief present additional arguments of petitioner in support of petitioner's eighth assignment of error. Point IV presents additional arguments of petitioner in support of petitioner's first and eighth assignments of error.

SUMMARY OF ARGUMENT.

I.

ORDINANCE 1945 IS NOT UNCONSTITUTIONAL AS VIOLATIVE OF THE FOURTEENTH AMENDMENT OR OF THE CONSTITUTION OF THE STATE OF INDIANA.

A.

ORDINANCE 1945 IS NOT IN CONFLICT WITH ANY PROVISION OF THE CONSTITUTION OF THE STATE OF INDIANA.

Respondent is an Illinois corporation. The provisions of section 23 article I of the constitution of the state of Indiana cannot be invoked by a non-resident of Indiana.

Sears v. *Board of Commissioners of Warren County*, 36 Ind. 267 (1871).

Even if applicable this constitutional provision could not be relied upon to defeat the power of a municipality to limit the uses which may be made of its streets by a public utility.

State v. *Stickelman*, 182 Ind. 102, (1914).

Farmers & Merchants' Co-operative Telephone Company v. *Boswell Telephone Company*, 187 Ind. 371, (1918).

B.

ORDINANCE 1945 IS NOT IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

One engaged in the conduct of his business on the streets without obtaining a franchise so to do has no property right to continue using the streets in his business.

Packard v. *Banton*, 264 U. S. 140 (1923).

Greene v. *City of San Antonio,* 178 S. W. 6, (Texas Civ. App.—1915)
Memphis v. *State ex rel. Ryals,* 133 Tenn. 83 (1915).
Lane v. *Whitaker,* 275 Fed. 476 (1921).
Peoples Transit Company v. *Henshaw,* 20 F. (2d) 87 (1927).
Desser v. *City of Wichita,* 96 Kans. 820, (1915).
Schultz v. *City of Duluth,* 163 Minn. 65, (1925).
Denny v. *City of Muncie,* 197 Ind. 28, (1925).
Ex parte Dickey, 76 W. Va. 576, (1915).
Schoenfeld v. *Seattle,* 265 Fed. 726 (1920).
Lutz v. *New Orleans,* 235 Fed. 978 (1916).

A fortiori, the state or its authorized municipal agent may regulate and restrict the extent of use of the streets in carrying on the private business of a common carrier of passengers for hire.

Pine Bluff v. *Arkansas Traveler Bus Company,* 171 Ark. 727, (1926).
Dreyer v. *City Council of Union City,* 134 Atl. 624 (N. J.—1926).
Gill v. *City of Dallas,* 209 S. W. 209 (Tex. Civ. App.—1919).
Frick v. *City of Gary,* 192 Ind. 76, (1922).
Denny v. *City of Muncie,* 197 Ind. 28, (1925).
City of San Antonio v. *Fetzer,* 241 S. W. 1034 (Texas Civ. App.—1922).
Red Star Motor Drivers' Association v. *City of Detroit,* 234 Mich. 398, (1926).
Fritz v. *Presbrey,* 44 R. I. 207, (1922).
Decker v. *City of Wichita,* 109 Kans. 796, (1921).

C.

ORDINANCE 1945 IS NOT IN CONFLICT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In deciding this case, the circuit court of appeals has substituted its judgment as to the necessity of this ordinance, for the judgment of the city council.

See opinion of circuit court of appeals,—

Schappi Bus Line, Incorporated v. *City of Hammond*, 11 F. (2d) 940, (1926).

The circuit court has overlooked fundamental principles which must be kept in mind when determining whether the equal protection clause of the fourteenth amendment invalidates a municipal act.

When a classification made by the state or its municipal agent is called into question, if any set of facts can reasonably be conceived that would sustain it, the act will be upheld.

Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61, 78 (1910).

Village of Euclid, Ohio v. *Ambler Realty Co.*, 47 Sup. Ct. 114 (1926).

Rast v. *Van Deman & Lewis Company*, 240 U. S. 342 (1915).

Mutual Loan Co. v. *Martell*, 222 U. S. 225, 235 (1911).

Classification is not reviewable unless palpably arbitrary, nor is the fourteen amendment an excuse for courts' invading the legislative province.

Radice v. *New York*, 264 U. S. 292 (1923).

Jeffrey Manufacturing Company v. *Blagg*, 235 U. S. 571, 576-7 (1914).

Barrett v. *Indiana*, 229 U. S. 26, 29-30 (1912).

Missouri, Kansas and Texas Railway Company v. *May*, 194 U. S. 267 (1903).

Keokee Coke Co. v. *Taylor,* 234 U. S. 224, 227 (1913).

Manigault v. *Springs,* 199 U. S. 473, 480-1 (1905).

One who complains against legislative classification carries the burden of clearly showing that it is unreasonable and arbitrary. The presumption is always in favor of the constitutionality of the act.

Lindsley v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 79 (1910).

Middleton v. *Texas Power & Light Company,* 249 U. S. 152, 158 (1918).

Zahn v. *Board of Public Works of City of Los Angeles,* 47 Sup. Ct. 594 (1926).

Canada Atlantic Transit Company v. *City of Chicago,* 210 Fed. 7, 11 (1913).

Classifications between common carriers performing different types of transportation services, have been repeatedly upheld.

Packard v. *Banton,* 264 U. S. 140 (1923).

Peoples Transit Company v. *Henshaw,* 20 F. (2d) 87 (1927).

Frick v. *City of Gary,* 192 Ind. 76 (1922).

Denny v. *City of Muncie,* 197 Ind. 28 (1925).

City of San Antonio v. *Fetzer,* 241 S. W. 1034 (Texas Civ. App.—1922).

Red Star Motor Drivers' Association v. *City of Detroit,* 234 Mich. 398 (1926).

In re Cardinal, 170 Cal. 519 (1915).

Decker v. *City of Wichita,* 109 Kans. 796 (1921).

Allen v. *City of Bellingham,* 95 Wash. 12 (1917).

Memphis Street Railway v. *Rapid Transit Company,* 133 Tenn. 99 (1915).

Gill v. *City of Dallas*, 209 S. W. 209 (Texas Civ. App.—1919).

Pine Bluff v. *Arkansas Traveler Bus Company*, 171 Ark. 727 (1926).

The courts have uniformly refused to hold arbitrary and invalid, classifications made by states or their municipal agents, to which far stronger objections could be made, than exist in the case at bar.

Peoples Transit Company v. *Henshaw*, 20 F. (2d) 87 (1927).

New York, New Haven and Hartford Railroad Company v. *New York*, 165 U. S. 628 (1896).

Erb v. *Morasch*, 177 U. S. 584 (1899).

Barrett v. *Indiana*, 229 U. S. 26, 29-30, (1912).

Atlantic Coast Line Railroad Company v. *State of Georgia*, 234 U. S. 280 (1913).

Armour & Company v. *State of North Dakota*, 240 U. S. 510 (1915).

St. Louis Iron Mountain & Southern Railway Company v. *State of Arkansas*, 240 U. S. 518 (1915).

Dominion Hotel, Incorporated v. *State of Arizona*, 249 U. S. 265 (1918).

II.

ORDINANCE 1945 IS NOT INVALID AS UNDULY INTERFERING WITH THE INTERSTATE MOTOR COACH OPERATIONS OF RESPONDENT.

So long as it does not act unreasonably, the state or its authorized agent, in the absence of federal regulation, has the power to regulate the manner of use which may be made of its highways for the private business of interstate common carrier service.

Buck v. *Kuykendall*, 267 U. S. 307 (1924).

Bush Co. v. *Malloy*, 267 U. S. 317 (1925).

Clark v. *Poor*, 47 Sup. Ct. 702 (1926).
Morris v. *Duby*, 47 Sup. Ct. 548 (1926).
Hess v. *Pawloski*, 47 Sup. Ct. 632 (1926).
Interstate Busses Corporation v. *Holyoke Street Railway Company*, 273 U. S. 45 (1926).
Sprout v. *City of South Bend*, 198 Ind. 563 (1926).
Interstate Busses Corporation v. *Blodgett*, 19 F. (2d) 256 (1927).
American Transit Company v. *City of Philadelphia*, 18 F. (2d) 991 (1927).

There is no discrimination against interstate carriers by ordinance 1945. The ordinance is a proper and legally valid exercise of local police power exerted for the public safety, convenience and welfare in the general use of overburdened streets. The regulations made by the ordinance do not unduly or directly burden interstate commerce. Interstate carriers are not immune from such regulation.

Buck v. *Kuykendall*, 267 U. S. 307 (1924).
Cooley v. *Board of Wardens of Port of Philadelphia*, 12 How. 299 (1851).
Cleveland &c. Ry. Co. v. *Illinois*, 177 U. S. 514 (1899).
Minnesota Rate Cases, 230 U. S. 352, 402 (1912).
Clark v. *Poor*, 47 Sup. Ct. 702 (1926).
Interstate Busses Corporation v. *Holyoke Street Railway Company*, 273 U. S. 45 (1926).
Kane v. *New Jersey*, 242 U. S. 160 (1916).
Hendrick v. *Maryland*, 235 U. S. 610 (1914).
Erie Railroad Company v. *Board of Public Utility Commissioners*, 254 U. S. 394 (1920).
Denver & Rio Grande Railroad Company v. *Denver*, 250 U. S. 241 (1918).
South Covington & Cincinnati Street Railway Company v. *City of Covington*, 235 U. S. 537 (1914).

Escanaba Company v. *Chicago*, 107 U. S. 678 (1882).
Atlantic Coast Line Railroad Company v. *State of Georgia*, 234 U. S. 280 (1913).
Transportation Company v. *Parkersburg*, 107 U. S. 691 (1882).
Morgan's S. S. Co. v. *Louisiana Board of Health*, 118 U. S. 455 (1885).
New York, New Haven and Hartford Railroad Company v. *New York*, 165 U. S. 628 (1896).
Lake Shore, etc. Railway Co. v. *Ohio*, 173 U. S. 285 (1898).
Hennington v. *Georgia*, 163 U. S. 299 (1895).
Packet Company v. *Catlettsburg*, 105 U. S. 559 (1881).

The commerce clause of the federal constitution cannot be used as a means to hamper local agencies in meeting and solving the problem of determining and adjusting the use to be made of the streets by various classes of users.

III.

PETITIONER HAS AUTHORITY UNDER THE INDIANA LAW TO ENACT ORDINANCE 1945.

The law of Indiana does not authorize respondent to operate common carrier motor bus service within the city of Hammond except with the consent of the city.

The legislative policy of Indiana has been to vest in municipal authorities almost exclusive control of the streets within the municipality.

Acts of Indiana 1905, c. 129, sec. 53, sub-divisions 31, 32, 38, and 53, pp. 250-2, 256.
Acts of Indiana 1905, c. 129, secs. 267 and 269, pp. 407-9.
Acts of Indiana 1911, c. 104, sec. 2, p. 181.

Acts of Indiana 1913, c. 76, secs. 97 and 110, pp. 200 and 205-6.
State v. *Stickelman*, 182 Ind. 102 (1914).
State v. *Denny*, 118 Ind. 449 (1889).
Winfield v. *Public Service Commission*, 187 Ind. 53 (1917).

Under this power to control its streets, the municipality may regulate and control motor carriers for hire seeking to use its streets.

Frick v. *City of Gary*, 192 Ind. 76 (1922).
Denny v. *City of Muncie*, 197 Ind. 28 (1925).
Sprout v. *City of South Bend*, 198 Ind. 563 (1926).

It has long been the legislative policy to allow no public utility to establish itself in a municipality without the consent of the municipality.

Acts of Indiana 1905, c. 129 sec. 254, p. 396 as amended by Acts of Indiana 1911, c. 104, sec. 2, p. 181.
Acts of Indiana 1913, c. 76, sec. 97, p. 200.

The legislative acts of 1925 did not deprive municipalities of the power to regulate and control the use of their streets by motor vehicle common carriers. The general motor vehicle regulatory act expressly provides that the power to control and regulate the use of the streets by motor driven commercial vehicles used for public hire shall remain with the municipality.

Acts of Indiana 1925, c. 213, sec. 45, p. 597-8.
Frick v. *City of Gary*, 192 Ind. 76 (1922).
Denny v. *City of Muncie*, 197 Ind. 28 (1925).
Sprout v. *City of South Bend*, 198 Ind. 563 (1926).

The provisions of the Moorhead act which declare that common carriers by motor bus are public utilities do not

withdraw from municipalities this power of regulating and controlling the use of their streets.

Acts of Indiana, 1925, c. 46, secs. 1-10, pp. 138-142.

In requiring motor bus common carriers to secure the consent of the municipality in, or through which they desire to operate, as well as to secure certificates of public convenience and necessity, the legislature made a requirement already existing in several states.

2 Laws of New York 1919, c. 307, p. 942.

Acts and Resolves of Massachusetts 1926, c. 163.

Laws of Wisconsin 1915, c. 546, p. 738.

Highway Motor Bus Co. v. *City of Lansing*, 238 Mich. 146 (1927).

IV.

RESPONDENT IS ILLEGALLY OPERATING IN INTRASTATE MOTOR BUS SERVICE IN INDIANA. NO INJUNCTION SHOULD HAVE BEEN GRANTED PROTECTING THESE ILLEGAL OPERATIONS OF RESPONDENT.

A.

IF FOR NO OTHER REASON, THE PURPORTED CERTIFICATES HELD BY RESPONDENT ARE INVALID BECAUSE THEY WERE ISSUED TO A FOREIGN CORPORATION.

A foreign corporation under the Indiana law cannot receive a permit or certificate to give local public utility service.

Acts of Indiana 1913 c. 76, sec. 99 p. 201.

Respondent to whom these purported certificates were issued by the public service commission is an Illinois corporation. The certificates for intrastate service are therefore void.

B.

THE PUBLIC SERVICE COMMISSION OF INDIANA HAS NO JURISDICTION TO GRANT CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY COVERING COMMON CARRIER MOTOR BUS SERVICE WITHIN THE CITY OF HAMMOND.

By a proviso contained in section 5 of the Moorhead act the legislature of Indiana has given petitioner the sole power to grant certificates of public convenience and necessity for common carrier motor bus service within the city of Hammond.

Acts of Indiana 1925, c. 46 sec. 5, pp. 140-1.

The proviso of section 5 is not unconstitutional. It is a general, not a local or special law within the meaning of section 23 of Article IV of the Indiana constitution. Even if it were local or special legislation, it would not be invalid. If the legislature passes a local or special law (on subjects other than those specifically enumerated in section 22 of article IV of the state constitution) the courts cannot and will not determine whether a general law could have been enacted. The question is purely a legislative one and the decision of the legislature is final.

Gentile v. *State*, 29 Ind. 409 (1868).
State v. *Kolsem*, 130 Ind. 434 (1891).
Longworth v. *City of Evansville*, 32 Ind. 322 (1869).
Mode v. *Beasley*, 143 Ind. 306 (1896).
Smith v. *Indianapolis Street Ry. Co.*, 158 Ind. 425 (1901).
Johnson v. *Board of Commissioners*, 107 Ind. 15 (1886).
School City of Marion v. *Forrest*, 168 Ind. 94 (1906).
Young v. *The Board of Commissioners*, 137 Ind. 323 (1893).

The proviso of section 5 does not violate the equal protection clause of the fourteenth amendment of the constitution

of the United States. The state may delegate to differe state agencies the control and regulation of like utilities.

Springfield Gas & Electric Company v. *City Springfield*, 257 U. S. 66, 70 (1921).
Missouri v. *Lewis*, 101 U. S. 22 (1879).

The proviso of section 5 is not unconstitutional by reas of section 19 of article IV of the Indiana constitution, pr viding that the subject of an act must be expressed in t title. The proviso is a part of the plan of regulating mot vehicle common carriers. This is what the title shows the a is to do. The Indiana supreme court has frequently pass upon the requirements of section 19 of article IV of the sta constitution. The Moorhead act is clearly within the limi of these requirements.

Maule Coal Co. v. *Partenheimer*, 155 Ind. 100 (190
Clark v. *Darr*, 156 Ind. 692 (1901).
State v. *Arnold, et al.*, 140 Ind. 628 (1894).
Marion, B. & E. Traction Co. v. *Simmons*, 180 In 289 (1913).
Mull v. *Indianapolis, etc., Traction Co.*, 169 Ind. 2 (1907).
Western Union Telegraph Co. v. *Braxtan*, 165 In 165 (1905).

Regardless of the question of the validity of ordinan 1945, respondent is not entitled to injunctive relief, unless can establish that it is lawfully operating in petitioner cit Since respondent has not taken the steps necessary in ord to secure the right to operate intrastate in petitioner city, is in equity with unclean hands and cannot procure injunctiv relief.

Pittsburgh, C. C. & St. L. Ry. Co. v. *Town of Croth ersville*, 159 Ind. 330 (1902).

City of Louisville v. *Louisville Home Telephone Co.*, 279 Fed. 949, 960 (1922).

Baker v. *City of Grand Rapids*, 142 Mich. 687 (1906).

Jose v. *Utley*, 185 Cal. 656 (1921).

Slovanian Association v. *City of Portland*, 111 Ore. 335 (1924).

Village of Cedar Springs v. *Schlick*, 81 Mich. 405 (1890).

ARGUMENT.

I.

ORDINANCE 1945 IS NOT UNCONSTITUTIONAL AS VIOLATIVE OF THE FOURTEENTH AMENDMENT OR OF THE CONSTITUTION OF THE STATE OF INDIANA.

A.

ORDINANCE 1945 IS NOT IN CONFLICT WITH ANY PROVISION OF THE CONSTITUTION OF THE STATE OF INDIANA.

A page will suffice to demonstrate that the ordinance violates no prohibition of the Indiana constitution. That constitution contains no prohibition similar to the limitations placed upon governmental action by the due process or equal protection clauses of the fourteenth amendment. The only section in the Indiana constitution upon which either the circuit court or respondent could attempt to rely would be the privilege and immunities provision. Indiana constitution, section 23, article I (appendix, 105). The supreme court of the state has expressly determined that the provisions of this section do not apply to a non-resident of Indiana. In *Sears* v. *Board of Commissioners of Warren County*, 36 Ind. 267 (1871), the supreme court, after considering and quoting this section of the state constitution, concluded, p. 280:

> "The above quoted section from our State constitution can have no application to non-residents of the State. The word citizen as used in said section has exclusive reference to citizens of this State, and not to citizens of other states who are doing business in this State."

A fortiori, this section has no application to a foreign corporation. Respondent in this case is an Illinois corporation, not an Indiana corporation. (R. 2). The finding of the

circuit court that respondent is an Indiana corporation is wholly at variance with the undisputed fact. (R. 2).

Again, the state supreme court has held that this constitutional provision cannot be relied upon to defeat the power of a municipal agency to limit the uses which may be made of its streets by a public utility.

State v. *Stickelman*, 182 Ind. 102, (1914).

Farmers & Merchants' Co-operative Telephone Company v. *Boswell Telephone Company*, 187 Ind. 371, (1918).

The circuit court appears to have taken the position that ordinance 1945 as applied to respondent is violative of the constitution of Indiana. Such a view entirely disregards the interpretation of the Indiana constitution by the supreme court of the state, and on this point the court was obviously in error.

B.

ORDINANCE 1945 IS NOT IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It is also quickly evident that ordinance 1945 is not invalid as an act in violation of the due process clause of the fourteenth amendment. Decisions, uniform in this court and numerous state supreme courts, establish this proposition. A person has no property right in the highways of the state. One engaged in the conduct of his busniess on the highways without obtaining a franchise so to do has no property right to continue such business. Such use of the highways is a privilege and (disregarding for the moment the questions presented in connection with an interstate carrier) such use may be exercised only to the extent and in the manner allowed by the state or its authorized agent. It may be wholly prohibited by the state or its agent without any infringement upon the due process clause of the fourteenth amendment.

In *Packard* v. *Banton,* 264 U. S. 140 (1923) this court, in considering the effect of the fourteenth amendment on statutes governing motor vehicle public carriers, said p. 144:

> "If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper."

In the leading case of *Greene* v. *City of San Antonio,* 178 S. W. 6 (Texas Civ. App.—1915), the court said, p. 7:

> "No individual has the inherent right to use a street or highway for business purposes. No man has the right to use a street for the prosecution of his private business, and his use for that purpose may be prohibited or regulated as the state or municipality may deem best for the public good."

In *Memphis* v. *State ex rel. Ryals,* 133 Tenn. 83, (1915), the court said, p. 97:

> "It is too clear for extended discussion that it was competent for the legislature under the police power to regulate the use of the streets and public places by jitney operators, who, as common carriers, have no vested right to use the same without complying with a requirement as to obtaining a permit or license. The right to make such use is a franchise, to be withheld or granted as the legislature may see fit."

In *Lane* v. *Whitaker,* 275 Fed. 476 (1921), the court said, p. 480:

> "The right, common to all, to the use of highways, is the ordinary use made thereof; but where, for private gain, a jitney owner wants a special and extraordinary benefit from the highway, to use it for such commercial purpose, the Legislature may, in the exercise of its police powers, wholly deny such use or it may permit it to some and deny it to others, and this is because of the extraordinary nature of such use."

In the recent decision of *Peoples Transit Company* v. *Henshaw,* 20 F. (2d) 87 (1927) the United States circuit court of appeals, eighth circuit, upheld a city ordinance permitting busses operated as a part of a local street railway system to operate on certain streets, but excluding other common carrier motor vehicles. Circuit Judge Stone said, p. 89:

> "There is no vested right in the use of streets. The Legislature may deny, grant or condition such use, or delegate such powers to the municipalities. This is the law under the Constitution of Oklahoma, as decided by the Criminal Court of Appeals of that state in *McGuire* v. *Wilkerson,* 209 P. 445, 448, and is the general rule. *Packard* v. *Banton,* 264 U. S. 140, 144, 44 S. Ct. 257, 68 L. Ed. 596. We have no doubt of the validity of the 1925 act, even as above construed."

In *Desser* v. *City of Wichita,* 96 Kans. 820, (1915), the court thus stated, pp. 823-4:

> "Modern requirements for municipal transportation render it essential that the power to regulate by the governing body be broad * * *.
>
> "Whatever natural right a citizen may have to traverse the streets of his city with a motor vehicle for the conveyance of his family or his friends, no inherent right exists to devote his vehicle to the public use of carrying passengers for hire and to appropriate to himself the use of all the streets for purposes of profit."

In *Schultz* v. *City of Duluth,* 163 Minn. 65 (1925), the court said, p. 68:

> "To do business upon public streets is not a matter of right, like the right of ordinary travel. Nor is the right to carry on such a business to be placed upon the same basis as that of conducting a lawful occupation upon private property within a municipality. The use of public streets for private enterprise may be for the public good, but, even so, it is a privilege that may be granted, regulated or withheld."

See also:

Denny v. *City of Muncie,* 197 Ind. 28 (1925).

Ex Parte Dickey, 76 W. Va. 576 (1915).
Schoenfeld v. *Seattle,* 265 Fed. 726 (1920).
Lutz v. *City of New Orleans,* 235 Fed. 978 (1916).

By ordinance 1945 petitioner did not assume to exercise this broad power of exclusion, which, under the decisions above referred to, clearly could be exercised by the state or its agent. Ordinance 1945 does not exclude any motor coach public carrier from passing over any street or parts of streets within the limits of petitioner city except one to four blocks in the most congested portion of the business section. All other streets of the city are open, subject only to the prohibition against using the same as waiting rooms and loading places. The common council of petitioner has limited the manner of use in such respects as in its judgment will best serve to avoid traffic congestion upon the streets of petitioner and to remove dangers to persons using [illegible].

Regulations much more restrictive of the movement of public passenger vehicles over the streets, have been uniformly upheld by decisions of the highest courts of the states. In nearly every instance one of the objections urged against such legislative action was that it deprived the regulated carrier of property without due process of law. This argument has, however, been uniformly unavailing.

Thus, in *Pine Bluff* v. *Arkansas Traveler Bus Company,* 171 Ark. 727 (1926), a city ordinance upheld by the state supreme court required intercity motor bus common carriers to establish stations within the city and prohibited them from stopping on the streets of the city to take on or discharge passengers.

In *Dreyer* v. *City Council of Union City,* 134 Atl. 624 (N. J.—1926), the city, by an elaborate ordinance of thirty-three sections, regulated motor busses (apparently intercity busses only) and provided the times for such busses leaving and entering the city. The New Jersey supreme court sus-

tained the validity of this ordinance against claims of unconstitutionality.

In *Gill* v. *City of Dallas,* 209 S. W. 209 (Texas Civ. App.—1919), the ordinance excluded from "a wide, irregular circle around the heart of the business section" of Dallas, motor vehicles transporting passengers for hire in the kind of service usually given by a street railway. The constitutionality of the act was sustained.

In *Frick* v. *City of Gary,* 192 Ind. 76 (1921), the ordinance prohibited jitney busses from receiving or discharging passengers upon any part of five named streets. These streets were the only north and south streets in the central business section of the city or within three-quarters of a mile of a very large manufacturing plant employing 8,000 men. The act was upheld by the Indiana supreme court.

In *Denny* v. *City of Muncie,* 197 Ind. 28 (1925), the same court sustained the validity of a city ordinance making it unlawful to run or operate any jitney bus on any street upon which a street car line was operating.

In *City of San Antonio* v. *Fetzer,* 241 S. W. 1034 (Texas Civ. App.—1922), the Texas court held constitutional an ordinance confining the operations of jitney busses to comparatively few, and to the less-used, streets of the city of San Antonio.

In *Red Star Motor Drivers' Association* v. *City of Detroit,* 234 Mich. 398 (1926), the Michigan supreme court sustained an ordinance prohibiting jitneys from operating on the principal streets leading out from the business center of the city and through any of the parks and boulevards.

In *Fritz* v. *Presbrey,* 44 R. I. 207 (1922), a Providence ordinance prohibited operations of motor busses within a fixed area in the retail business district and prescribed a limited route or routes to be traveled within the city. The constitutionality of the ordinance was sustained in the highest court of the state.

In *Decker* v. *City of Wichita,* 109 Kans. 796 (1921), the Wichita ordinance involved prohibited motor vehicles carrying passengers for hire from taking on or discharging passengers in any street upon which street railways operated. This provision was held constitutional.

It is apparent, then, that there is no conflict between the ordinance before this court in the case at bar and the due process clause. Even where one has a property interest, his use of such property may, when necessary for the welfare, health and safety of the general public, be regulated within broad limits by the state or its agent. In such case, the due process clause serves to stake out the limits. If it were necessary to demonstrate the fact, we do not believe there would be any difficulty in convincing this court that the present ordinance, as applied to a property right, is within the limits of an allowed interference therewith. But no property right is here involved. And when one has not a vested right the due process clause has no application.

No one has any vested right to carry on his business upon the public highway. A carrier plying his trade upon the public highways has no property right so to do. A carrier using the public streets for his terminals and loading stations does not acquire any property right by reason of the fact that for a time public authorities did not restrain or regulate such use. Denial of such use at any time, absolute prohibition of such use, cannot therefore constitute a taking of property by the state. *A fortiori,* a regulation of such use is not subject to this constitutional objection. Any contention that ordinance 1945 is void as in violation of this provision of the fourteenth amendment must be dismissed.

C.

ORDINANCE 1945 IS NOT IN CONFLICT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The real question then is whether or not ordinance 1945 violates the equal protection clause of the fourteenth amendment. The circuit court seems to have decided that it did. This holding, petitioner insists, was error.

The decision of the circuit court proceeds without due regard to certain basic principles. The language of the court clearly indicates that the decision was reached because the court failed to agree with the municipal legislature as to the method of dealing with its traffic congestion problem, and because the court took the position that petitioner had not established by sufficient evidence the necessity of the regulation.

Assuming for the moment that the classification selected by the city in this case could be considered one of questionable constitutionality, it will at once be perceived that the approach by which the circuit court attacked the question necessarily pushed over the line of exclusion a legislative act which properly belonged within the boundary mark.

In dealing with this controversy, the circuit court has wholly overlooked the fundamental and long established principles of law which safeguard the state or its municipal agency against unwarranted judicial interference with the exercise of legislative functions. It has approached the problem by placing upon petitioner the burden of establishing the validity of the classification provided for by the ordinance. In its opinion the circuit court said:

> "We are of opinion that the record does not show any valid reason for the passage of such an ordinance because of the congestion in the streets."

This language of the opinion indisputably shows that the circuit court usurped the legislative power to decide whether

this ordinance was wise legislation, and that it refused to uphold the ordinance because it was not convinced that the regulation was necessary.

This erroneous method of approach has led to an error in result. The ordinance has been declared invalid because petitioner failed to convince the court of its validity. The court has simply reversed the proper rule. The burden of establishing the invalidity of the ordinance properly rests upon the person attacking it. This rule is fundamental and essential to the preservation of legislative independence. Disregard of the rule in a court decision is particularly dangerous when surrounded by such sweeping language as is found throughout the circuit court's opinion. If the language of that court is here approved, then municipalities, and even states, will be left powerless to protect their streets or provide for the use thereof in such manner as will best meet the public needs.

Certain essential principles must always be kept in mind in applying constitutional restrictions to an ordinance assailed. To these the circuit court has failed to adhere.

In the first place, the equal protection clause of the fourteenth amendment does not take away from the state or its municipal agent the power to classify objects of legislation, but admits of the exercise of a wide scope of discretion in that regard, and affects what is done only when it is without any reasonable basis and is purely arbitrary. When classification made by the state or its agent is called into question, if any set of facts can reasonably be conceived that would sustain it, the act will be sustained. A classification to be obnoxious must be wholly arbitrary and destitute of reasonable basis.

> *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61, 78 (1910).

In passing upon the constitutionality of a building zone ordinance, this court has at the last term restated the fore-

going principle. In *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 47 Sup. Ct. 114 (1926) this court said, pp. 118-9:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.
>
> "• • • In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.' *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204, 33 S. Ct. 44, 47 (57 L. Ed. 184)."

In *Rast* v. *Van Deman & Lewis Company*, 240 U. S. 342 (1915), this court said, p. 357:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

In *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235 (1911), this court said:

> "We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion."

In the second place, mathematical nicety in classification is not an essential to the legality of an act. It suffices if the classification is practical. Classification is not reviewable unless palpably arbitrary, nor is the fourteenth amendment an excuse for courts' invading the legislative province. Un-

less there can be no fair reason for the attempted classification, the courts cannot set aside the act. Within wide limits the field of choice as to who shall come within the field of regulation is to be settled by the legislative agency.

In *Radice* v. *New York*, 264 U. S. 292 (1923), this court pointed out, p. 294:

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker."

In *Jeffrey Manufacturing Company* v. *Blagg*, 235 U. S. 571, 576-7 (1914), this court said:

> "This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject-matter of its laws, what shall come within them, and what shall be excluded."

In *Barrett* v. *Indiana*, 229 U. S. 26, 29-30 (1912), this court said:

> "The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to make the laws and of the courts to enforce them. This court has had such frequent occasion to consider

this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' "

In *Missouri, Kansas and Texas Railway Company* v. *May,* 194 U. S. 267 (1903), these principles are thus succinctly stated, p. 269:

"It is admitted also that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow, is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *McCulloch* v. *Maryland,* 4 Wheat. 316. When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom its leaves untouched."

And in *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227 (1913) it is said:

"It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presum-

ably where experience shows it to be most felt, is not
be upset by thinking up and enumerating other instanc
to which it might have been applied equally well, so f
as the court can see. That is for the legislature to jud
unless the case is very clear. *Lindsley* v. *Natural Ca*
bonic Gas Co., 220 U. S. 61, 81. *Central Lumber Co.*
South Dakota, 226 U. S. 157, 160. *Patsone* v. *Penns*
vania, 232 U. S. 138, 144. The suggestion that othe
besides mining and manufacturing companies may ke
shops and pay their workmen with orders on themselv
for merchandise is not enough to overthrow a law th
must be presumed to be deemed by the legislature e
extensive with the practical need."

See also:

Manigault v. *Springs*, 199 U. S. 473, 480-1 (1905).

Thirdly, it is incumbent on one who complains against le
islative classification to show clearly that it is unreasonab
and essentially arbitrary. The presumption is always
favor of the validity of legislation.

Thus, in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.
61 (1910), *supra*, this court said pp. 78-9:

"One who assails the classification in such a law mu
carry the burden of showing that it does not rest up
any reasonable basis, but is essentially arbitrary."

In *Middleton* v. *Texas Power & Light Company*, 249 U.
152, (1918), this court further asserted, p. 157:

"There is a strong presumption that a legislature u
derstands and correctly appreciates the needs of its ow
people, that its laws are directed to the problems ma
manifest by experience, and that its discriminations a
based upon adequate grounds."

In one of the recent zoning cases, *Zahn* v. *Board of Publ*
Works of City of Los Angeles, 47 Sup. Ct. 594 (1926), th
court in upholding a zoning ordinance said, p. 595:

"The common council of the city, upon these a
other facts, concluded that the public welfare would

promoted by constituting the area, including the property of plaintiffs in error, a zone 'B' district, and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibilty of determining the question."

And the United States circuit court of appeals, seventh circuit, has thus interpreted this principle, *Canada Atlantic Transit Company* v. *City of Chicago,* 210 Fed. 7, 11 (1913):

"Their challenge of the ordinance for unreasonableness imposes upon the appellants the most difficult burden of proof established for any issue, in law or equity."

The constitutionality of ordinance 1945 must be determined, not as an abstract question, but in the light of the actual conditions and problems existing in Hammond. Those conditions and problems have been carefully pointed out, *supra* 3-9. The attention of the court has also been called to the fact that each of the first two sections of the ordinance provides a separate and distinct regulation. Each of these sections must be separately analyzed and considered. Furthermore the constitutionality of this ordinance as applied to respondent must be considered with reference wholly to the streets over which respondent insists upon operating. The reasonableness of the ordinance's provisions as applied to *those* streets is the sole question here in issue. Respondent insists upon its power to operate without restriction over the most congested and busy streets of the city. It insists on its right to traverse across the very central point of the downtown traffic congestion. Practically the entire routes over which the respondent insists on running are upon streets on which street car lines are operating (R. 3, 6, 62

[map]). The question here is not the theoretical reasonableness or unreasonableness of ordinance 1945 as applied to some conjectured situation. It is the question whether ordinance 1945 as applied to the operations of respondent constitutes an unreasonable regulation.

The reasonableness of an ordinance controlling the use of streets can only be intelligently decided after these conditions and facts have been fully weighed. This basic principle has been thus admirably stated by this court in the recent decision upholding the principle of city zoning. In *Village of Euclid, Ohio* v. *Ambler Realty Company,* 47 Sup. Ct. 114 (1926), *supra,* Mr. Justice Sutherland said, p. 118:

> "Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

There is, of course, no categorical test for proper classification. One decision is seldom, if ever, absolutely controlling in reaching a decision in another case. Varying circumstances peculiar to each situation make it necessary for the court to analyze anew each problem presented. Prior de-

cisions do, however, form a guide and index to the irregular and ofttimes indeterminate boundary line which marks the limit of constitutional classification.

Before proceeding to examine such classifications as may be helpful to the court in the case at bar, it is worth while to consider the distinguishing characteristics between the common carriers included and those excluded from the operation of the present ordinance.

The municipal legislature was confronted with the problem of serious traffic congestion. The situation was one growing out of an industrial center located against the boundary line of the second largest city in the United States. Obviously this fact alone would assure heavily burdened streets. The condition, however, was particularly aggravated by five main line railroads operating at grade and converging practically at the heart of the business district of the city. Not many months prior to the enactment of ordinance 1945 the city had suffered the experience of having thrown into this congestion an innumerable number of jitneys. The city authorities had recognized the need of the elimination of these numerous carriers throughout the congested portions of the city, but had also realized the necessity of supplying to its own inhabitants a regular and certain city-wide form of local transportation. This problem was met in the most practical way by granting a franchise for local common carrier motor coach service.

The circuit court of appeals assumed the fact, which will hereafter be clearly established, that the city had the exclusive power to provide for this local service. (*infra* 76-89). Granting this fact, the sole question in regard to classification is whether a classification permitting rights in the use of the streets to a franchised company furnishing local transportation and denying similar rights to strictly intercity and interstate common carrier motor coach operators is proper classification in a police measure designed for the protection, safety and general convenience of the municipal inhabitants.

In effect the city authorities said this:

> "We shall allow the streets of the city to be used without restriction by carriers whom we franchise to give local service. This will allow necessary local transportation between all parts of the city. We shall, however, diminish congestion and procure greater safety on the highways by doing two things:
>
> "*a.* Eliminating from parts of certain streets extending from one to four blocks each way from the central point of the congested downtown business district, motor busses operated by common carriers legally authorized to to carry inter-city passengers only; and
>
> "*b.* Requiring common carriers, not authorized to give local service, to proceed directly to a terminal or terminals within the city rather than permitting them to use the street corners for loading zones and waiting stations, thereby continually weaving in and out of traffic, adding to the delay on, and endangering the use of, the highways.
>
> "The inhabitants of the city must have transportation to and from their homes and places of business. The outside traveler to the city will not be greatly inconvenienced by being compelled to travel to such stations as the interstate and intercity carrier may maintain. Any inconvenience which he may suffer is necessary in order to adjust fairly for the general public benefit the uses of the highways of the city."

Certainly even respondent would not contend that the municipal authorities, in regulating the use of the streets, in protecting the general public in its uses of the streets, and in determining the proper adjustments necessary in order that overburdened highways may most nearly serve the public convenience and best provide proper avenues for traffic, cannot classify between common carriers by motor vehicle and other motor vehicle users, or that an exclusion of the former from the use or certain manner of use of the streets cannot be effected without a like exclusion or regulation of the latter. Such classifications have repeatedly been sustained. Likewise classification between different types of common car-

riers has been often upheld. In regulations governing the use of the streets, the courts have repeatedly recognized that restrictions upon jitney operations may be made without similar restrictions upon street railway systems. Classification between street railway common carriers and motor vehicle common carriers has been repeatedly upheld. And in such regulations, classification between jitneys and motor busses; between taxicabs and motor busses or jitneys; between motor busses doing a local business and those doing only an intercity business; and between motor busses operated as a part of a street railway system and other motor busses independently operated, has been sustained.

Thus, in *Packard* v. *Banton,* 264 U. S. 140 (1923), *supra,* the regulatory measure attacked applied only to taxicabs and expressly excluded street cars and omnibusses. This court sustained the classification.

In *Peoples Transit Company* v. *Henshaw,* (U. S. Daily, June 10, 1927, p 11), *supra,* the regulatory ordinance upheld by the court prohibited on the first two streets on either side of a street on which a street car line was located, operation of motor busses doing a local business, but allowed operation on such streets by motor busses doing an intercity business and by motor busses doing a local business but operated by the street railway.

In *Frick* v. *City of Gary,* 192 Ind. 76 (1922), *supra,* the regulations affected only jitneys, defined as motor vehicles having a capacity of nine passengers or less used for transporting passengers for hire, and, further, excluded taxicabs, hotel busses and railroad busses from the prohibitons of the ordinance.

In *Denny* v. *City of Muncie,* 197 Ind. 28 (1925), *supra,* the regulation applied only to jitneys.

The ordinances involved in *City of San Antonio* v. *Fetzer,* 241 S. W. 1034 (Texas Civ. App.—1922), *supra* and *Red Star*

Motor Drivers' Association v. *City of Detroit,* 234 Mich. 398 (1926), *supra,* affected only jitneys.

A regulatory ordinance attacked in *In re Cardinal,* 170 Cal. 519 (1915), applied only to "jitney busses" and did not include other motor busses, even though used for the carriage of passengers for hire.

In *Decker* v. *City of Wichita,* 109 Kans. 796 (1921), *supra,* the ordinance prohibited motor vehicles carrying passengers for hire from taking on or discharging passengers on certain streets upon which street cars were permitted to make such stops.

In *Allen* v. *City of Bellingham,* 95 Wash. 12 (1917), the ordinance regulated only jitneys or motor busses operating in local business, and excluded other carriers such as autostages, intercity busses, taxicabs and street cars.

In *Memphis Street Railway* v. *Rapid Transit Company,* 133 Tenn. 99 (1915), the statute provided for the regulation of jitneys in their use of the streets, but did not include street railways or taxicabs.

In *Gill* v. *City of Dallas,* 209 S. W. 209 (Texas Civ. App.–1919), *supra,* a regulatory ordinance affected only motor vehicles transporting passengers for hire in the kind of service usually given by a street railway.

In *Pine Bluff* v. *Arkansas Traveler Bus Company,* 171 Ark. 727 (1926), *supra,* the regulatory ordinance applied only to intercity motor busses operating for hire.

It is true that the classification made by the city under ordinance 1945 is a classification between two groups of common carriers by motor coach, but the carriers in each class have a different function to perform in the transportation field, and it is inconceivable that anything in the fourteenth amendment should be held so to limit the power of a municipal agency that it could not put any restrictions on the use of its streets by intercity and interstate carriers without de-

stroying the effectiveness of its local transportation system. Certainly no one would seriously contend that a regulation prohibiting steam and interurban railways from stopping every block within a city would deny such carrier equal protection of the laws if a street railway within the city were not brought within the prohibitions.

It is true that at the time of the enactment of the ordinance the franchised carrier, Calumet Motor Coach Company, was, in addition to its local transportation business, engaged in interstate transportation of passengers between Chicago and Hammond. It is also true that the busses so used, were at the same time used in giving a local transportation service to the north part of Hammond. These busses starting at the corner of State and Hohman streets passed through to the state line, the western boundary of the city, thus traversing a distance over the streets of Hammond of about six miles. In this distance, many local passengers were hauled. Except during peak periods, all the local service to this north territory was given by means of these busses. The right which the Calumet Motor Coach Company had to stop on the street to receive and discharge passengers was a right existing to it, not as an interstate carrier but as a carrier of local passengers. If section 2 of the ordinance had prevented the franchised carrier, while passing over this route, from stopping to receive and discharge passengers, it would have been unfair to the people of Hammond living in the north part of the city.

Classifications far nearer the line of arbitrary action, classifications in which the excluded group, considering the ill to be cured, was a more similar to the included group, have been repeatedly upheld.

Peoples Transit Company v. *Henshaw,* 20 F. (2d) 87 (1927), has already been referred to. In that case Oklahoma City enacted an ordinance prohibiting the operation by independent operators of a local motor bus business

on the first two streets on either side of a street car line. The ordinance expressly permitted the street car company to operate on these streets busses giving a local service. Intercity busses were also allowed to operate on these streets. The United States circuit court of appeals, eighth circuit, upheld the classification. That court, after discussing the differences between the excluded class and those permitted to use the streets under the terms of the ordinance, said p. 89:

> "* * * all differences are not unreasonable and, therefore, illegal discriminations. In legislating for the public welfare, legislative bodies (in this case the city council) may, usually do, and should base their action upon actual conditions as they exist. It is to such conditions that the legislation will apply and it is such that will be affected thereby. Therefore, the matter of discrimination must be determined by an understanding of those conditions and of the effect designed or to be expected thereon from the legislation. If the difference is based upon a conception of the public welfare which finds reasonable basis in the existing conditions, it is not an illegal discrimination—otherwise, it is. The controlling factor is the welfare of the public affected."

In *New York, New Haven and Hartford Railroad Company* v. *New York,* 165 U. S. 628 (1896), a state statute made it unlawful for any railroad to heat its passenger cars on other than mixed trains by any stove or furnace kept inside the car. The act contained a proviso that it should not apply to railroads less than fifty miles in length. The court denied that this constituted improper classification. This court upheld the statute and said, p. 634:

> "In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable."

Erb v. *Morasch,* 177 U. S. 584 (1899), involved an ordinance limiting the running of railroad trains through Kansas City at a speed greater than six miles an hour. The ordinance provided that it should not apply to the Interstate Rapid Transit Railway Company, a line serving locally Kansas City, Missouri and Kansas City, Kansas. This court upheld the classification and said, pp. 586-7:

> "With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains.
>
> "But in this case we are not left to any mere matter of presumption. The testimony discloses that the Interstate Rapid Transit Railroad is simply a street railroad connecting the cities of Kansas City, Missouri, and Kansas City, Kansas, operated at the time of the passage of the ordinance by steam power, but with that power used only in dummy engines, and, at the time of the accident involved in this case, by electricity. It is true that there is testimony that at or near the place where the accident happened parties thought the operation of the street railroad was more dangerous than the operation of the railroad of which the plaintiff in error was receiver, but the validity of such an ordinance is not determinable by individual judgments. It is not a question to be settled by the opinions of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necesary to uphold the ordinance is that there is a difference, and that existing it is for the city council to determine whether separate regulations shall be applied to the two."

Barrett v. *Indiana,* 229 U. S. 26 (1912), *supra,* involved an Indiana statute classifying for the purpose of safety regulations between bituminous coal mines and block coal mines. It appears that in the latter, mining was at a distance of about ninety feet from the surface, and that in the former

the depth was considerably greater. This court sustained the classification and said, pp. 29-30:

> "The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to to make the laws and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' "

Atlantic Coast Line Railroad Company v. *State of Georgia*, 234 U. S. 280 (1913), involved a Georgia statute requiring railroads to use a 300 watt electric headlight. The act contained a proviso to the effect that it should not apply to tram roads, mill roads and lumber or logging roads. This classification was sustained, the court saying, p. 289:

> "As to the exceptions made by the statute of tram roads, mill roads, etc. it is impossible to say that the differences with respect to operation and traffic conditions did not present a reasonable basis for classification."

In *Armour & Company* v. *State of North Dakota*, 240 U. S. 510 (1915), it was urged that the state statute requiring that lard be sold in a certain type of container, arbitrarily and without reasonable ground singled out lard from all other food products sold in packages, such as butter. This court, in denying this position, said p. 517:

> "The power may be determined by degrees of evil or exercised in cases where detriment is specially experienced."

St. Louis, Iron Mountain & Southern Railway Company v. *State of Arkansas*, 240 U. S. 518 (1915), involved a statute

requiring full switching crews on railroads but exempting from the statute railroads operating lines less than one hundred miles in length. This court refused to find that the classification was arbitrary and unconstitutional. It said, p. 521:

> "The distinction seems arbitrary if we regard only its letter, but there may have been considerations which determined it, *and the record does not show the contrary.* We have recognized the impossibility of legislation being all-comprehensive and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant."

In *Dominion Hotel, Incorporated* v. *State of Arizona,* 249 U. S. 265 (1918), this court passed upon a statute restricting the hours of labor of women in hotels and restaurants, but exempting from the restrictions railroad restaurants or eating houses located upon railroad right of ways and operated by or under contract with any railroad company. This classification was sustained and this court, speaking through Mr. Justice Holmes, said, pp. 268-9:

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co.* v. *Shaw,* 248

U. S. 297, 303. Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know. *Cusack Co.* v. *Chicago,* 242 U. S. 526, 530, 531.

"Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from the passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important distinction between such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines. 'Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things.' "

These decisions necessarily clear away any first blush impression that ordinance 1945 is obnoxious to the fourteenth amendment because of arbitrary classification. This court will not be misled by the fact that *franchised local* carriers excluded from the provisions of the ordinance and those carriers included within the terms of the ordinance are both operating motor coaches. It is indeed a specious argument to urge that since both are hauling people for hire there can be no classification between them. The service which each gives, at least the operations of each lawfully conducted, is an entirely different service. In that is the basis of classification and the distinguishing characteristics which make the classification legal. The franchised carrier is the carrier authorized to furnish the local transportation. The people served by that carrier are those traveling daily between their homes within petitioner city and the business or factory centers of this city. They are the people living

within petitioner city and to whom the authorities of the city owe an obligation to provide an adequate, flexible, convenient, local transportation. On the other hand, respondent, or any other non-franchised carrier, comes into the city unauthorized to give such local service and are neither under any obligation to give such service nor are permitted to give it without first securing a franchise from the city. Respondent, and all similarly situated, bring in the transients from the outside or take out residents of petitioner upon occasional trips. Respondent's operations fall in the class with interurban operations of steam or electric lines. Surely, in an endeavor to obtain a maximum of benefit for all in the use of overburdened streets, the city can regulate as a class strictly interurban carriers without being compelled thereby to put like restrictions upon its local transportation system. It may well be that the greatest fairness to all in the use of the highways will be attained by limiting the interurban carrier in the manner provided by ordinance 1945. At the same time, it may be, and probably is, true that to regulate in the same manner the local transportation agency would be to impose a restriction which, instead of serving would be detrimental to the general welfare of petitioner city. We think that it is clear that the position of the circuit court that ordinance 1945 was void as in violation of the equal protection clause of the fourteenth amendment cannot be sustained.

II.

ORDINANCE 1945 IS NOT INVALID AS UNDULY INTERFERING WITH THE INTERSTATE MOTOR COACH OPERATIONS OF RESPONDENT.

One of the three motor coach lines which respondent operates carries only passengers travelling interstate; another one carries both interstate and intra-state passengers. In the district court, and again on appeal to the circuit court of appeals, respondent attacked ordinance 1945 as an attempt

to control and burden interstate commerce. To sustain this position, respondent relied almost wholly upon *Buck* v. *Kuykendall*, 267 U. S. 307 (1924), and *Bush Co.* v. *Malloy*, 267 U. S. 317 (1924). Respondent erroneously interpreted the holdings of this court in those cases as taking the position that the use made of the highways of the state by an interstate carrier is not subject to regulation by the state or its municipal agent. Respondent has insisted that under those decisions both the state and the municipality have been deprived of the right to regulate the manner of use of the streets of the municipality by a carrier operating in interstate commerce.

Respondent's attempt to invalidate ordinance 1945 by these decisions is an endeavor to distort beyond all recognition the principles there involved. Since the date of those decisions, interstate carriers, seeking to use the highways of the states without any restriction, have repeatedly attempted to expand and misconstrue the scope of the court's holding. Counsel in this case, as is generally the practice, has insisted that this court by those decisions has given to interstate operators a *carte blanche* to the use of all streets and highways; that interstate motor coach carriers are free to ply their trade upon the public highways in such manner as they will; and that the practical result of the *Buck* and *Bush* decisions is to prevent the effective control by the state or its agency of the manner of use of the streets by an interstate carrier.

The *Buck* and *Bush* decisions are too recent to require extended discussion in this court. Neither of these cases denies the power of the state to control and regulate the manner of use which may be made of its highways for the private business of interstate common carrier service. Clearly, neither of these cases denies to the state the right to regulate and control, as local needs demand, congestion upon the state

highways. In each of these cases the state authority asserted a power to determine when interstate commerce was needed, —in other words, to control and regulate the commerce itself. The thing which this court condemned was not a right of the state to put reasonable limitations upon the manner of use of its streets for private business or reasonably to regulate and restrict the use of those highways so they would best serve the public needs. The thing condemned was the attempt by the state to determine whether there was a demand for interstate transportation service.

The distinction is not a mere formal one. There is a vital difference between an attempt by a state to say who may engage in interstate common carrier service and an attempt to define the manner in which those engaged in interstate common carrier service may use the state highways in their private business. The former is simply outside the province of the state. It is a matter exclusively within the power of the federal government. The latter, at least until congress acts, is primarily within the control and power of the state.

Since the decision of the circuit court of appeals in the case at bar, and since the filing of briefs in this court, this court has had occasion to pass upon several appeals involving state regulations touching motor vehicles operating interstate: *Clark* v. *Poor*, 47 Sup. Ct. 702 (1926) passing on state regulations and fees enforced against interstate carriers; *Morris* v. *Duby*, 47 Sup. Ct. 548 (1926), upholding as applied to interstate carriers limitations as to weight of trucks; *Hess* v. *Pawloski*, 47 Sup. Ct. 632 (1926), sustaining a state statute requiring a non-resident motorist to appoint a state official as his agent to accept process in proceedings growing out of use of highways by non-resident motorist. See also *Interstate Busses Corporation* v. *Holyoke Street Railway Company*, 273 U. S. 45 (1926).

In accord with the views expressed by this court in these recent cases are the late holdings of other federal courts and the Indiana supreme court.

Sprout v. *City of South Bend*, 198 Ind. 563 (1926).

Interstate Busses Corporation v. *Blodgett*, 19 F. (2d) 256 (1927).

American Transit Company v. *City of Philadelphia*, 18 F. (2d) 991 (1927).

These decisions clearly show the fallacy of the position taken by respondent as to the effect of the holding in the *Buck* and *Bush* cases. They recognize the broad regulatory powers possessed by the state or its agent in governing, regulating and controlling the use of its highways by motor vehicles operating in interstate commerce. These decisions wipe out the argument of counsel for respondent that ordinance 1945 cannot be applied to an interstate carrier. These recent decisions are not in conflict with the *Buck* and *Bush* decisions. They do, however, show the untenability of the interpretation placed upon those earlier decisions, by interstate motor vehicle operators, who sought to use them as a license given by the federal government authorizing the unrestrained, unregulated use of the streets and highways by interstate carriers.

It is, of course, unnecessary in this case to determine how broad and absolute, as applied to an interstate carrier, may be the power of the state to limit the use of its highways. This court is here concerned only with the effect of each of the two separate provisions of this particular ordinance. As has already been pointed out, ordinance 1945 does not attempt to control or *regulate* the commerce which passes over the streets of the city. It does not attempt to exclude such commerce. It does attempt to regulate, in a reasonable manner and for the purpose of making congested streets best serve the needs of the public as a whole, the use of the

city's streets by common carriers. It does not discriminate among interstate carriers, nor does it discriminate between interstate carriers and inter-city carriers. An interstate carrier who is not authorized to do a local business is treated exactly the same as an intrastate carrier who is unauthorized to do a local business. It does classify between carriers who are authorized to furnish local transportation on the one hand and all interurban carriers on the other.

In providing for general safety, convenience and welfare in the use of the over crowded streets, the municipal authorities deemed it necessary to prohibit motor bus carriers, not lawfully engaged in giving local transportation, from entering a limited area in the central business district, and from using certain streets of the city as loading zones for receiving and discharging passengers. The ordinance enacted for this purpose does not limit the right of the passage of interstate or inter-city busses over the streets of the city except to the very limited extent provided for by section 1. Such limitation surely cannot be held to be a direct burden on interstate commerce, for it only requires a slight detour as heretofore shown (*supra* 6-7). As an illustration, we might cite the interstate railroad cases where it has been held by this court that a state or municipality may require such railroads to stop at certain stations, to remove tracks from congested intersections, to construct viaducts, to elevate tracks, etc., not only in order to promote safety, but also to benefit the general convenience and welfare.

A long line of decisions by this court, reaching back to the very earliest cases involving the commerce clause of the constitution, settles beyond controversy the principle that one is not immune from police regulation by the state merely because he is engaged in interstate commerce.

In the case of *Buck* v. *Kuykendall*, 267 U. S. 307 (1924), *supra*, it is said, p. 315:

> "It may be assumed that Section 4 of the state statute is consistent with the Fourteenth Amendment; and also,

> that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable."

In *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299 (1851), this court said, p. 319:

> "The mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations."

And in *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514 (1900), Mr. Justice Brown, speaking for this court, after reviewing a number of its decisions, said, pp. 516-7:

> "Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employes, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good."

An interstate carrier is subject to the reasonable police regulations of the state until congress by its acts clearly appropriates the entire field of regulation. The regulation by congress to a limited extent, even, does not destroy state power. It is only where congress has deemed it necessary to take over the entire field that the state loses its right to act. In connection with interstate commerce by motor coaches, congress has not yet seen fit to pass any legislation whatsoever. In this situation the states are not powerless to protect and control the uses of their highways, nor is the interstate motor coach carrier free from all restrictions.

The governing principles are succinctly stated by this court in the *Minnesota Rate Cases*, 230 U. S. 352, 402 (1912):

> "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. * * * Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power."

The decisions applying these principles and bearing most directly upon the question at bar are those resulting from a controversy between an interstate carrier and the state or its agency which is exercising the power of police regulation to promote safety or convenience in the use of the streets or other public facilities. These decisions show clearly the broad scope of state power. They likewise effectively answer the claim that the ordinance attacked in the case at bar is inhibited by the commerce clause of the federal constitution.

In *Clark* v. *Poor*, 47 Sup. Ct. 702 (1926), *supra*, this court stated, p. 703:

> "The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to ensure safety and convenience and the conservation of the highways."

And in *Interstate Busses Corporation* v. *Holyoke Street Railway Company*, 273 U. S. 45 (1926), *supra*, this court pointed out, p. 52:

> "Undoubtedly, the State has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce. *Packard* v. *Banton*, 264 U. S. 140, 144; *Kane* v. *New Jersey*, 242 U. S. 160; *Hendrick* v. *Maryland*, 235 U. S. 610."

In *Kane* v. *New Jersey*, 242 U. S. 160 (1916) and *Hendrick* v. *Maryland*, 235 U. S. 610 (1914), this court upheld state statutes prohibiting the driving of automobiles into or through a city without having them licensed in the state. In the latter case this court said, p. 622:

> "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles —those moving in interstate commerce as well as others. * * * This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce."

In *Erie Railroad Company* v. *Board of Public Utility Commissioners*, 254 U. S. 394 (1920), the state agency in the exercise of its police regulatory powers undertook to compel the elevation or depression of fifteen grade crossings in the city of Patterson, New Jersey. The necessary cost exceeded $2,000,000. The company contended that the requirement was an unreasonable exercise of the state police power, imposing

an enormous burden without any real occasion or necessity; that the result would so impoverish the road as to impair seriously its ability to function in its interstate carriage; and that the ordinance resulted in the destruction of sidings and connections used in interstate commerce. This court held, however, that none of these considerations could be availed of to preclude the state from exercising its police regulatory power in determining the means necessary to guard public safety and convenience. This court said, pp. 410-1:

> "Being places to which the public is invited and that it necessarily frequents, *the State*, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, * * *. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & Rio Grande R. R. Co.* v. *Denver*, 250 U. S. 241, 246. To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens. * * * If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce."

In *Denver & Rio Grande Railroad Company* v. *Denver*, 250 U. S. 241 (1919) the municipal authorities required the removal by an interstate carrier of certain trackage in the city of Denver connecting its own and other railroad yards. Less convenient means of reaching these yards remained available, but it was beyond dispute that the company would ex-

perience some disadvantages. This court affirmed a judgment of the state court sustaining the ordinance. It was said, p. 246:

> "The objection that the ordinance offends against the commerce clause of the Constitution is not tenable. The ordinance makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly."

And in *South Covington & Cincinnati Street Railway Company* v. *City of Covington,* 235 U. S. 537 (1914), this court upheld as applied to an interstate carrier the act of the state agency limiting the number of persons per coach that could be carried, regulating the ventilation, cleaning and fumigating of cars, and the number of cars used. This court there said, p. 546:

> "In numerous instances this court has sustained local enactments, passed in the exercise of the police power of the State, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given much consideration in the *Minnesota Rate Cases,* 230 U. S. 352, and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the State to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce. Summing up the matter, it is there stated, p. 402:
>
> > 'Our system of government is a practical adjustment by which the National authoritiy as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarily one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Con-

> gress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. * * *'"

In *Escanaba Company* v. *Chicago*, 107 U. S. 678 (1882), this court sustained as against an interstate carrier by water an ordinance of the city of Chicago prohibiting the opening of bridges on the Chicago river during morning and evening rush hour periods and limiting the time of each opening at other periods to ten minutes. The company insisted that the enforcement of the ordinance incovenienced and delayed its service and that, when such service was interstate, the state agency could not thus burden or affect this service. This court thus clearly enunciates the governing rule, p. 683:

> "But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, *and are more deeply concerned than others in their wise management.* Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty."

In *Atlantic Coast Line Railroad Company* v. *State of Georgia*, 234 U. S. 280 (1913), *supra*, this court upheld a state statute regulating the type of headlight which must be used within the state on locomotives. It was there said, p. 292:

> "If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

Thus, against the complaint of interstate carriers, this court has upheld state laws or municipal ordinances regulating its wharves, *Transportation Company* v. *Parkersburg*, 107 U. S. 691 (1882); providing rules of quarantine, *Morgans S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455 (1885); regulating steam heating of cars, *New York, New Haven and Hartford Railroad Company* v. *New York*, 165 U. S. 628 (1896); requiring a certain number of trains to stop in villages of certain size, *Lake Shore, etc. Railway Co.* v. *Ohio*, 173 U. S. 285 (1898); prohibiting the movement of freight trains on Sunday, *Hennington* v. *Georgia*, 163 U. S. 299 (1895); controlling and regulating landing by river boats, *Packet Company* v. *Catlettsburg*, 105 U. S. 559 (1881).

Particularly important in a case involving the manner of use of city streets is the proper application of principles fixing the power of local regulation till congress sees fit to act. With the daily increase in the crowding of the highways, inability of local authorities to make such regulation

would necessarily be disastrous. In all rapidly growing communities, and especially in such communities adjacent to large centers of population, the problem of adjusting fairly and equitably the manner of using the streets is an essential and difficult one. Streets and avenues of a city and the other highways of a state are, of course, paths for interstate commerce. But those same streets and highways are primarily and fundamentally the nourishing and growth-giving factors of the local community. Interstate commerce has no right to use them in such manner as to prevent their performing this function. They have been principally built and are primarily sustained by the community or municipality. No other question is more essentially local than the one of determining in what manner the streets of a city may most beneficially serve all.

The burden which streets must carry, the functions which they must perform, and the manner in which they can most effectively and fairly serve all, is best known, and in the nature of things can only be best known, by the local authorities. To deny such authorities a wide scope of discretionary power in the regulation and control of the manner of use of these streets and highways is to strike at the basic foundation of local development. To hamper unnecessarily such control prevents that balancing of the manner of use which is essential to the general benefit of the whole public. Such a restriction of the local regulatory power would not only be destructive of local progress but would make subservient to the unreasonable whims of one group of users, the needs of the whole of the traveling public.

The commerce clause of the constitution cannot be seized upon to accomplish such an end. It was never intended to, and does not, in the circumstance of lack of congressional action, deprive the state and the municipality of power to regulate the manner of use which may be made by an interstate carrier of the streets of the city and the highways of the state.

Undoubtedly counsel for respondent will urge upon the court that a cataclysm will befall interstate carriers by motor coach if this court applies the principle that the commerce clause does not guarantee to such carriers the unrestricted, unregulated use of the highways. No more complete answer to this argument can be given than that furnished by Mr. Justice Harlan in dealing with a like conjectured dread, *Lake Shore, etc. Railway Co.* v. *Ohio,* 173 U. S. 285, 308 (1898):

> "Imaginary cases are put for the purpose of showing what might be done by the State that would seriously interfere with or discriminate against interstate commerce, if the statute in question be upheld as consistent with the Constitution of the United States. Without stopping to consider whether the illustrations referred to are apposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be legitimate exertions of the police powers of the State, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

In the light of the principles just discussed and the applications pointed out, it is evident that ordinance 1945 does not conflict with any prohibitions of state regulation found in the commerce clause of the federal constitution. The attack upon this ordinance by respondent, premised upon its invalidity under the commerce clause, must fail.

Not for many years has the line of demarcation between the power of the federal government and the power of the states been so much discussed or been so persistently presented to the courts as at the present time. The rights of the states are being championed against what many seem to

think is infringement by the federal government. The present case, in so far as the question of interference with interstate commerce is concerned, directly involves and concerns this controversy. The boundary line of state regulatory power in interstate commerce cases is sufficiently uncertain without further making indefinite its course by tracing therein the capricious sinuosities requested by the respondent.

III.

PETITIONER HAS AUTHORITY UNDER THE INDIANA LAW TO ENACT ORDINANCE 1945.

We come then to the question which perhaps logically should have been first, of determining whether petitioner has, under the law of the state of Indiana, been delegated the power to enact an ordinance of the nature of ordinance 1945. That petitioner has such power is indisputably revealed by even a brief consideration of the Indiana statutes.

Respondent will undoubtedly argue here as it did in the court below that it possesses certificates of public convenience and necessity issued by the public service commission of Indiana, and that the city has no power to pass any regulation affecting the free use of the streets or highways over which it travels under these certificates. Two of these certificates purport to give respondent the right to carry on a local business in the city of Hammond and in the contiguous Indiana city of East Chicago. The public service commission had no power to issue such certicates and they are void (*infra*, 74-89). The other certificate held by respondent purports to authorize a motor bus service carrying interstate passengers only. It purports to be nothing more than a declaration that the interstate carrier has filed insurance. (R. 39-43). At most it can be nothing more than a declaration that the interstate carrier had at the time of the issuance of the certificate complied with applicable state laws. See *Clark* v. *Poor*, 47 Sup. Ct. 702, (1926), *supra*.

Respondent may also go so far as to insist that, since the 1925 session of the Indiana legislature, petitioner has no power to determine who may use its streets for the purpose of furnishing local common carrier motor coach transportation.

There are two answers to these anticipated contentions of respondent. One, which is applicable to these claims as applied to the two certificates purporting to authorize local business, is that these certificates upon which respondent relies are wholly void and were issued in excess of any authority which the public service commission possessed. This will be discussed under heading IV of this brief. The other answer, which disposes of respondent's contentions as applied to all its operations, is that even if the certificates were valid they do not, under the Indiana law, serve to deprive petitioner of its right to regulate, govern and control the use of its streets. A certificate of public convenience and necessity, when lawfully issued by the state commission, merely determines that public convenience and necessity for service exists. It does not, however, give the right to the holder to use the streets and avenues of a city except with the consent of the city, and in conformity with, the regulations made by the city.

It is recognized, of course, that petitioner, as a municipal corporation, is a creature of the legislature. Its powers of police regulation and of proprietary capacities are those fixed by the lawful acts of its creator. No one will dispute that the power to determine who shall control the use of the streets lies solely in the legislature. That body may grant to or withdraw from any governmental agency the privilege of controlling the use of the streets and highways of the state. The question is not as to the source of power; but as to the place where the legislature had lodged the privilege. This can only be determined by a review of the various applicable legislative acts.

The general legislative policy in the state of Indiana has been to vest within the local agency the exclusive control of the streets and avenues within its limits. This policy is clearly stated by the Indiana statutes. That this was the situation when the legislature met in 1925 is apparent from a study of the Indiana laws then in force. (appendix 93-99).

Acts of Indiana 1905, c. 129, sec. 53, sub-divisions 31, 32, 38 and 53, pp. 250-2, 256.

Acts of Indiana 1905, c. 129, secs. 267 and 269, pp. 407-9.

Acts of Indiana 1911, c. 104, sec. 2, p. 181.

Acts of Indiana 1913, c. 76, secs. 97 and 110, p. 200 and 205-6.

The decisions of the supreme court of Indiana remove any possible doubt upon this question, and expressly assert this power of municipalities by ordinance to determine to what extent public conveyances may ply their trade on the streets of a city and may appropriate the use of city streets in the business of receiving and discharging their passengers.

Thus, in *State* v. *Stickelman*, 182 Ind. 102, (1914), *supra*, the state supreme court, after the enactment of the Shively-Spencer utility act, thus summarizes the law on this point, p. 105:

> "The legislature has vested in the municipal authorities almost unlimited control of streets and alleys."

In *State* v. *Denny*, 118 Ind. 449, (1889), that court said, p. 470:

> "There are many things which are included within the definition of police power which are purely local, and of which the State has only an indirect interest, *and which, under our State government, are exclusively within the control of local authorities.* Such we regard • • • control of the streets, sidewalks, sewers and waterworks of a city or town."

And in *Winfield* v. *Public Service Commission,* 187 Ind. 53 (1917), that court said, p. 63:

> "Said act provides that the common council shall have exclusive power over the streets, highways, alleys and bridges within said city for certain named general purposes. The act is broad enough to authorize cities to grant the right of user to public corporations."

This question of the scope of the city's power to control the use to be made of its streets by motor carriers for hire was first presented to the Indiana supreme court in *Frick* v. *City of Gary,* 192 Ind. 76, (1921), *supra.* In that case the city of Gary enacted an ordinance providing:

> "It shall be unlawful for any person, firm or corporation to operate any vehicle, except street cars and taxicabs, engaged in the carriage of passengers for hire, to stop to take on or discharge passengers upon Broadway, Washington street, Massachusetts street, Connecticut street or Adams street, public highways in the city of Gary, etc."

The evidence showed that these streets extended from the north to south city limits, and were the only north and south streets passing through the business district. The ordinance was attacked both as an act in excess of the powers conferred upon the city and as an unconstitutional exercise of alleged power. The ordinance was upheld both in the trial court and upon appeal by the state supreme court. Upon the question of the power of the city to control the use of its streets, the supreme court, after setting out part of the statutes hereinbefore cited, said, p. 84:

> "We think the power to enact and enforce such an ordinance, whenever necessary in the opinion of the common council, was clearly conferred by the statutes above quoted. Burns' 1914, sections 8964, 8655, subds. 31, 38 53; *Peters* v. *City of San Antonio* (Tex. Civ. App.) 195 S. W. 989. We cite below additional decisions of different courts upholding the power of cities to enact and enforce the ordinances therein under consideration for the control of 'jitney busses' in the use of streets. Al-

len v. *Bellingham,* 95 Wash. 12, 163 Pac. 18; *Desser* v. *City of Wichita,* 96 Kan. 820, 153 Pac. 1194, L. R. A. 1916D, 246; *In re Cardinal,* 170 Cal. 519, 150 Pac. 348 L. R. A. 1915F, 850; *Thielke* v. *Albee,* 79 Or. 48, 153 Pac. 793; *Ex Parte Parr.,* 82 Tex. Cr. App. 525, 200 S. W. 404; *Gill* v. *City of Dallas* (Tex. Civ. App.) 209 S. W. 209; *Schoenfeld* v. *City of Seattle,* (D. C.) 265 Fed. 726, 731; *Ex parte Bogle* (78 Tex. Cr. App. 1) 179 S. W. 1193; *Irwin* v. *Atlantic City,* 90 N. J. Law, 99, 100 Atl. 565."

And in *Denny* v. *City of Muncie,* 197 Ind. 28, (1925), *supra,* the state supreme court was again called upon to pass upon the powers of a city in Indiana to control the use of its streets by a class of common carriers. In the *Denny* case the city by ordinance provided:

"No person, firm or corporation shall drive, run or operate any Jitney Bus upon or along any part of any street, avenue or other highway in the city of Muncie upon which there is located a street railway track or tracks upon or over which street cars are regularly operated, * * *."

Again it was contended that this prohibition was void as being an attempted act in excess of the city's power. But the court, in upholding the ordinance, said pp. 33-6:

"The general assembly has granted certain powers to cities in regard to the control of streets and to the regulation of motor vehicle traffic. Every city has exclusive power, by ordinance, to control and care for its streets, and to prevent the obstruction or incumbrance of any of the streets, so as to impede the free use of same for its proper purposes. Sec. 11188, Burns 1926, sec. 8964 Burns 1914. * * *

"* * * In the absence of express statutory authority in the matter of municipal regulation of 'jitneys,' municipal ordinances in regard to same have generally been upheld when based on general statutes vesting in cities the right to control and regulate the use of their streets. Pond Public Utilities (3d Ed.) Sec. 766. In *Frick* v. *City of Gary,* (1922) 192 Ind. 76, 135 N. E. 346, it was held that a municipal corporation of this state has the power to enact an ordinance forbidding vehicles carrying passengers for hire, and excepting therefrom street

cars and taxicabs, from stopping on designated streets to receive or discharge passengers, such ordinance being a regulation of streets * * *.

"In 32 A. L. R. 752, it is said:

'Under the well-settled rule that a municipality, having the power to regulate the use of its streets, may pass any reasonable ordinance within its delegated powers governing automobile traffic on the streets, it has been generally held that a municipality has the right to pass an ordinance prohibiting or limiting the use of certain streets by motor vehicles operated for hire.'

"We hold that the city of Muncie, under the exclusive power granted to cities by the legislature to control and care for their streets, and under the general power granted them to regulate traffic, had the right to enact the parts of the ordinance to which objection has been made. Its power of such control was not restricted to streets which had been improved."

See also:

Sprout v. *City of South Bend*, 198 Ind. 563, (1926), *supra.*

Likewise it has long been the legislative policy in Indiana to allow no public utility to establish itself in a municipality without the consent of the municipality. Under the Shively-Spencer utility act, the consent of the municipality is always necessary before a utility can operate within a city. If an existing like utility is in the field, the consent of the city *and* a certificate of public convenience and necessity from the state public service commission must be secured.

Acts of Indiana 1905, c. 129, sec. 254, p. 396 as amended by Acts of Indiana 1911, c. 104, sec. 2, p. 181 (appendix 95-6).

Acts of Indiana 1913, c. 76, sec. 97, p. 200. (appendix, 97).

Farmers' & Merchants' Co-operative Telephone Company v. *Boswell Telephone Company*, 187 Ind. 371, (1918).

It is clear then that when the legislature met in 1925 the cities of Indiana were vested with power to control, regulate, limit and restrict the manner and extent of the use of their streets by common carriers.

At the 1925 session the Indiana legislature declared motor busses operating as common carriers to be public utilities and subjected them to certain regulations as utilities. This is the act which is commonly known as the Moorhead act.

At the same legislative session there was enacted a statute consisting of sixty-three sections and containing in general, provisions for the registration and licensing of, and the regulation of the use and operation of, motor vehicles. Section 45 of this act, however, expressly provides that the act shall not be construed as affecting the power of cities to make and enforce ordinances, rules and regulations affecting motor driven commercial vehicles used within their limits for public hire. (appendix, p. 104-5). This provision of section 45 is *identical with a similar section which was in effect at the time of the enactment of the general regulatory act of* 1925. Acts of Indiana 1913, c. 300, sec. 17, p. 790. (appendix, p. 100). The like 1913 provision was before the Indiana supreme court in the cases of *Frick* v. *City of Gary,* 192 Ind. 76, (1922), *supra, Denny* v. *City of Muncie,* 197 Ind. 28 (1925), *supra,* and *Sprout* v. *City of South Bend,* 198 Ind. 563 (1926), *supra.* In this last case the Indiana supreme court said, pp. 571-2:

> "And the facts that he did not have any stations or soliciting agents and did not confine his use of the streets of the city to driving on and along them in carrying interstate commerce, but went upon them with his motor vehicle and there offered the vehicle and his services generally for the use of patrons who would take passage and pay fare to a point in Michigan, using the street both for the solicitation and receipt of passengers, brought his car within the description of a 'motor driven commercial vehicle' and a 'motor driven commercial ve-

> hicle used within the limits (of the city) for public hire,' that may be charged license fees and subjected to regulations by the city notwithstanding the certificate of registration issued by the secretary of state."

The power, which the court in the above cited cases held municipalities possess, to control the use of their streets by common carriers, has already been pointed out. (*supra*, 65-8).

It is evident that this provision of section 45 can have no other effect than to leave the power of cities over motor driven commercial vehicles used for hire, exactly where it was prior to the legislative session of 1925. Unless, therefore, the provisions of the Moorhead act nullify the power of petitioner to control and regulate the use made of its streets by motor bus common carriers, that power remains as broad and exclusive as it was prior to 1925.

Counsel for respondent will, undoubtedly, insist here as he has in the court below, that the power of petitioner to control and regulate the use made of its streets by motor coach common carriers was taken away by the Moorhead act declaring such carriers to be public utilities. This act is set out in full in the appendix, pp. 99-103. The first section of this act, after declaring the business of operating common carrier motor bus service a public utility business, provides that such business "except as herein provided" shall be "subject to all the terms and provisions of" the Shively-Spencer public utility act of 1913, "in so far as the terms and provisions of said act may be reasonably applicable to such carriers."

A proviso contained in section 5 of the act reserved to certain municipalities, including petitioner and the contiguous city of East Chicago, the sole power to determine public convenience and necessity for local common carrier motor bus service. The scope and effect of this section will be discussed under heading IV of this brief. For the moment

we may disregard the fact that the city of Hammond comes within the proviso of section 5 of this act, and consider the situation under the provisions of the act exclusive of section 5.

By section 10 of the act, the legislature expressly asserted that none of the provisions of the act should operate to deprive any public authority of any jurisdiction which it then had or might thereafter acquire over public highways. This section alone, when construed in the light of the provision of section 45 of the general regulatory act, and when construed in the light of the provision of the public utility regulatory act of 1913 above discussed (*supra* 69-70), necessarily has the effect of rendering unlawful intrastate common carrier motor coach operation upon the streets of any Indiana city, unless the consent of the municipality is secured. In case of operations in municipalities not coming within the proviso of section 5 of the Moorhead act, a certificate of public convenience and necessity must also be secured from the public service commission.

Under the Shively-Spencer act no public utility can be forced upon a community against its consent. This theory of dual control is part and parcel of the Shively-Spencer act. To illustrate, under that act if a street car company seeks to establish a system in an Indiana city it must always secure the consent of the city. If there is already a street car system in the city with which it would compete it must also secure a certificate from the public service commission. Without this consent it can not operate, even though it has the consent of the city. So also if it first secures the certificate from the commission this is unavailing to authorize actual operations until the city has consented to the use of its streets by the utility.

Farmers' & Merchants' Co-operative Telephone Co. v. *Boswell Telephone Co.*, 187 Ind. 371 (1918), *supra.*

This idea of dual control is not unusual. It is an essential part of the American idea of government.

Certainly there is nothing in this principle which is not reasonably applicable to the public utility business of operating motor vehicles for hire. The courts cannot arbitrarily refuse to apply these applicable provisions of the 1913 act. The application of this provision is necessary if full effect is to be given to section 10 of the Moorhead act and to the provision in section 45 of the general regulatory act leaving to cities all the powers which they possessed to control and regulate motor driven commercial vehicles used within their limits for public hire.

The supreme court of Indiana has not yet construed the Moorhead act. The question has however been presented to the superior court of Lake county. *Twin City Bus Lines, Incorporated* v. *City of Hammond*, Lake superior court, case number 29374. In that case the bus company is represented by counsel for respondent. The court held that the proper interpretation of the Indiana law is the one here contended for by petitioner. The oral opinion of the court, which was taken down by the court reporter, is set out in the appendix to this brief pp. 107-114. An appeal is now pending in the Indiana supreme court.

Nor is there anything unusual in a requirement that a motor bus common carrier, even though holding a certificate from the commission, cannot operate in or through a city against the consent of the municipality. The question is in each case determined by the specific state statute or constitutional provisions. Examples of such requirements are found in the New York, Masachusetts, Wisconsin, and Michigan laws.

2 Laws of New York 1919, c. 307, p. 942.

Acts and Resolves of Massachusetts 1926, c. 163.

Laws of Wisconsin 1915, c. 546, p. 738.

Highway Motor Bus Company v. *City of Lansing*, 238 Mich. 146 (1927).

This power possessed by all Indiana municipalities to withhold or grant permission to utilities to use the streets is not directly involved in the case at bar. This feature of the Indiana law is here set forth mainly for the purpose of giving this court a complete picture of the extent to which the Indiana legislature has reserved to all municipalities the control over the use of their streets by public utilities. In the light of such far reaching control no serious consideration can be given to any contention that the regulatory provisions of ordinance 1945 are in excess of the powers given to municipalities by the Indiana statutes.

Ordinance 1945 is not an exercise of the general prohibitive power of the municipality. It is merely a regulatory act by which the city council, following its best judgment as to municipal needs, has sought to relieve street congestion and adjust equitably among all classes of traffic the use of the city streets. The ordinance is an attempt by the city to improve and, in part at least, eradicate a dangerous condition on the streets,—a condition which, unless changed, could only become increasingly injurious to public development, safety and welfare.

Under the Indiana law the responsibility is placed on the city authorities to regulate as public necessity requires. A city council which failed to act when need of action arose would, indeed, be derelict in its duty. The enactment of ordinance 1945 is not an usurpation of a power by the city but is an honest attempt at the fulfillment of obligations imposed by the legislature.

It is respectfully submitted that section 10 of the Moorhead act together with the other existing statutory provisions conferring upon the city power to control the use of its streets, is a complete and conclusive answer to any claim of respondent that ordinance 1945 is invalid because the Moorhead act and the general motor vehicle regulatory act of 1925 repealed and took away the power of Indiana municipalities to deter-

mine the use to be made of the streets by public utilities. It is further submitted that there is no merit to the claim that petitioner can no longer regulate the manner in which respondent may use the streets of Hammond. Respondent's claim that it has the right to use the streets of petitioner in defiance of the regulations and in disregard of the restrictions made by petitioner, must be denied.

IV.

THE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY UPON WHICH RESPONDENT RELIES ARE VOID. RESPONDENT IS ILLEGALLY OPERATING IN INTRASTATE MOTOR BUS SERVICE IN INDIANA. NO INJUNCTION SHOULD HAVE BEEN GRANTED PROTECTING THESE ILLEGAL OPERATIONS OF RESPONDENT.

The arguments already advanced clearly establish that ordinance 1945 is a reasonable regulation, lawfully enacted by the common council of petitioner. They further show that respondent has no right, in conducting its business, to use the streets of petitioner in a manner other than that authorized by petitioner. From the facts disclosed by the record it is obvious that there was a crying need for regulation; and that the regulation adopted bore a direct and reasonable relation to the condition to be remedied. The injunction sought by respondent was therefore properly denied by the district court, and the circuit court of appeals erred in reversing this ruling.

There is however a further, and conclusive reason why the circuit court must be reversed. The decision of that court enjoins enforcement of the ordinance as applied to any of respondent's operations. In so far as this ruling applies to intra-state operations, the decision is clearly wrong for the reason that respondent is carrying on these operations illegally, and therefore is not under any circumstance entitled to an injunction protecting this operation. Even though the ordinance had been invalid, no injunction should have been granted.

The fundamental fallacy of respondent's position throughout this case rests in the fact that respondent has assumed both the validity of its certificates of public convenience and necessity and the sufficiency of these certificates to override local restrictions and regulations. We have already pointed out that under the Indiana law these certificates, even if valid, could only authorize motor coach operation subject to local restrictions and regulations. (*supra* 63-74). As to the interstate business of respondent the sole question is whether the ordinance unduly burdens, or discriminates against, such business. It has been plainly shown that there is no such interference.

Under two of its three certificates respondent claims the right to do a local business in Hammond. As has been shown, under the Indiana law, even if the certificates were valid, respondent can not lawfully operate in local business in petitioner city, until it has been authorized so to do by petitioner. (*supra* 63-74). We shall now point out that these purported certificates are invalid.

A.

IF FOR NO OTHER REASON, THE PURPORTED CERTIFICATES ARE INVALID BECAUSE THEY WERE ISSUED TO A FOREIGN CORPORATION.

The certificates of public convenience and necessity purporting to authorize local service in Indiana are wholly void because issued to a foreign corporation. These purported certificates were issued to Schappi Bus Line, Incorporated. That company is an Illinois corporation. (R. 2). Section 99 of the Shively-Spencer utility act provides (Acts of Indiana 1913 c. 76 sec. 99, p. 201):

> "No license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Indiana or to a citizen of such state."

The Moorhead act declares all motor vehicles operating as common carriers for the transportation of passengers for hire to be public utilities, and provides that they shall be subject to the provisions of the Shively-Spencer utility act "in so far as the terms and provisions of said act may be reasonably applicable to such carriers." This does not mean that the public service commission or a court can pick out such provisions as it may select and apply only those. It means that *all provisions* that can reasonably be held applicable must be applied. There is nothing in section 99 that makes it inapplicable to motor vehicle common carriers. Surely there is nothing in the Moorhead act to indicate that the legislature intended to throw aside its long established and advisable policy of requiring that public service in Indiana should be given by Indiana corporations and not by foreign corporations.

No rights ever existed, or now exist, to appellant by reason of the public service commission issuing these alleged certificates.

B.

THE PUBLIC SERVICE COMMISSION OF INDIANA HAS NO JURISDICTION TO GRANT CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY COVERING COMMON CARRIER MOTOR BUS SERVICE WITHIN THE CITY OF HAMMOND.

The public service commission had no power under the law to issue certificates for local service in Hammond and contiguous cities.

Section 5 of the Moorhead act contains the following proviso:

> "And Provided, further, That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all,

for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the supreme court."

Prior to the enactment of the Moorhead act petitioner had granted a franchise contract providing for a city-wide system of local transportation by motor bus. (R. 55-6). Petitioner therefore is one of the cities of Indiana to which the proviso of section 5 applies. It is clear that under the terms of this proviso the public service commission has no jurisdiction to grant certificates of public convenience and necessity for intrastate motor vehicle service in petitioner or contiguous cities. The commission, however, in complete disregard of the statute, assumed to grant certificates to respondent.

Throughout this case respondent has recognized that the proviso of section 5 is fatal to its claim for an injunction. Respondent contended in the courts below and will undoubtedly contend here that the proper interpretation of the proviso is that petitioner is given the right to continue to regulate and control the franchised carrier but that the public service commission is given the right to grant certificates, to regulate and control any other carriers desiring to operate within the city of Hammond. Thus counsel for respondent has said (brief filed in circuit court of appeals pp. 40-1) that even in municipalities to which the proviso applied "all other carriers, not operating under contract with said City of Hammond within said City, were placed under the jurisdiction of the Public Service Commission". Such contention in the light of the obvious language of the proviso can not win the confidence of any court. It is a claim that while the city continues to regulate the franchised carrier, the commission

has the power to permit other carriers to compete with the franchised carrier, without the consent of the city. Where the legislature has provided that the city "shall continue to supervise, control, permit, contract for and regulate *such service*" counsel for respondent has substituted the provision that the city "shall continue to supervise, control, permit, contract for and regulate *the franchised carrier.*" Where the legislature has provided that *the city* shall "determine when, *if at all*, for public convenience and necessity, competing service shall be established", counsel for respondent would substitute "but the public service commission shall determine when, if at all, for public convenience and necessity, competing service shall be established."

Such flagrant revision of the act will not, of course, receive serious consideration. Respondent is forced to thus revise the act in order to furnish any foundation for any right to carry on the operations in Hammond. Respondent has revised the act to take care of the wrongful assumption of power by the public service commission. Under no possible interpretation or limitation of the proviso can these acts of the commission be sustained. They are simply acts in violation of the legislative will. They are wholly void and give respondent no basis or right.

a.

The Proviso of Section 5 of the Moorhead Act is Constitutional. It Does Not Violate Sections 22 and 23 of the Indiana Constitution.

In order to avoid the fact that the proviso is fatal to respondent's claim that it is operating lawfully, counsel has in the courts below argued that the proviso is unconstitutional. (See assignment of errors R. 84-5.)

Counsel there asserted that the proviso is invalid because in conflict with sections 22 and 23 of article IV of the Indiana

constitution restricting the power of the legislature to pass local or special laws.

Counsel's suggestion appears to be that the proviso can not be sustained as a general law because of an arbitrary classification of cities in regard to motor bus common carrier transportation; that, therefore, the proviso must be considered a local or special law and as such is void because of constitutional restrictions against such a law.

If it were necessary so to do, it could be easily established that the proviso is not a local or special law in the sense within which that term is used in the Indiana constitution. The proviso applies uniformly throughout the state where the same or similar circumstances exist. Every municipality within the state that had prior to the date of the act, undertaken to provide for a system of local motor vehicle transporation is treated alike and given the benefit of the proviso.

However, this question is immaterial. Even assuming that the proviso of section 5 is local and special legislation still that fact can not aid respondent. The proviso is still not violative of constitutional inhibitions.

In arguing that the proviso can not be sustained as a local or special act, counsel for respondent asserts that he relies on sections 22 and 23 of article IV of the constitution of Indiana (R. 84). Counsel has never pointed out in what way he claims section 22 has any application. In truth it has none. Section 22 enumerates seventeen matters as to which the legislature is forbidden to pass special or local laws(appendix 105-6). If the proviso of the Moorhead act were a local law and if it dealt with one of the seventeen matters named in section 22 it would, of course, be invalid. It is beyond dispute that the subject matter of the Moorhead act is not one of those enumerated in section 22. Counsel has apparently merely thrown in section 22 as a part of a vague claim against the validity of the act. Section 22 can then be omitted from further discussion.

Section 23 of article IV of the Indiana constitution provides:

> "In all cases enumerated in the preceding section, *and in all cases where a general law can be made applicable*, all laws must be general, and of uniform operation throughout the state."

The supreme court of Indiana has repeatedly and uniformly held that where the legislature passes a special or local law relating to a subject which is not specifically enumerated in section 22 the courts will not review such legislative determination. The legislature and the legislature alone is the judge of whether a general rather than a local or a special law can be made applicable. The courts can not and will not determine this question. It is a purely legislative one and the decision of the legislature is final.

In the leading case of *Gentile* v. *State*, 29 Ind. 409 (1868), the Indiana supreme court, after denying the contention that an act regulating fishing but excepting fishing in the Ohio and St. Joseph rivers was a local or special act, said, pp. 411-2:

> "* * * *But if it be a local law, still we are not prepared to hold that it is for that reason, in conflict with the section of the constitution before named.* * * * *It is clearly implied by that section,* (section 23) *and we know it to be true in fact, that in many cases local laws are necessary, because general ones cannot, properly and justly, be made applicable.* There are cases where a law would be both proper and necessary in a given locality or part of the state, where its subject is local, or where, *from local facts,* it is rendered necessary; but which, if made general, would either be inoperative in portions of the state, or from its inapplicability to such portions, would be injurious and unjust.
>
> "As the general assembly, then, have the power to pass local laws where general ones cannot be made applicable, and as the constitution does not declare, except in the cases enumerated in section 22, in what particular cases general laws can be made applicable, or designate the proper subjects of local legislation, who is to determine when a law may be local, or when a general law can be properly applied to the particular subject? *Most un-*

questionably those who make the law are necessarily required, in its enactment, to judge and determine, from the nature of the subject, and the facts relating to it, whether it could properly be made general, and of uniform operation throughout the state. If a local law be enacted on a subject not enumerated in section 22, we must presume that, in the opinion and judgment of the legislative department, a general law on the given subject could not be made applicable. Is the determination and judgment of the legislature in such cases conclusive, or is it subject to review and reversal by the courts?" * * *

and after setting forth cogent reasons why the legislative decision should be final, the Indiana supreme court concluded, p. 415:

"For the reasons stated, we are led to the conclusion that it is for the legislature alone to judge whether a law on any given subject, not enumerated in section 22, can be made applicable to the whole State."

In *State* v. *Kolsem,* 130 Ind. 434 (1891), the very argument here made that the act is in reality local, not general, and is void because of section 23 of article IV of the constitution, was advanced by counsel but rejected by the Indiana supreme court. In that case a statute providing for police boards classified cities on the basis of having as inhabitants 14,000 or over of children between six and twenty-one. The subject-matter of the act was not one of the seventeen matters upon which section 22 absolutely forbids local legislation. Counsel there, as here, insisted that the act was in reality local and special, not general; and then urged that as local legislation, it was violative of section 23. The answer of the Indiana supreme court in that case is applicable in reply to the claim here made and is decisive against respondent's contention. It was said, pp. 438-9:

"The subject to which the act under consideration is addressed is not one upon which the Legislature is forbidden to enact special laws. If the subject were one of those enumerated in the section which prohibits the enactment of special laws, we should have a very different

> case from the one before us; but it is not within the classes enumerated, nor can it be brought within the enumeration save by interpolating a provision not written in the Constitution. * * * If the enactment of such a law as the one before us is forbidden, it must be by virtue of section 23 of article 4 of the Constitution, for the subject embraced in the act is not included in the enumeration found in the preceding section. But section 23, as has been again and again decided, does not prohibit the enactment of special laws, where general ones cannot be made applicable. It has also been repeatedly held that whether a general law can be made applicable to a particular subject is exclusively a legislative question, and it necessarily results that if the question is legislative the whole matter, with all its incidents, must be determined by the Legislature. It has been steadily held since the decision in *Gentile* v. *State*, 29 Ind. 409, that the Legislature is the exclusive judge of whether a general law can be made applicable to a subject not enumerated in section 22 of article 4 of the Constitution."

In *Longworth* v. *City of Evansville*, 32 Ind. 322 (1869), an act of the legislature granting to the city of Evansville power to annex certain surrounding territory was held not to be in conflict with section 23 of article IV of the Indiana constitution. The court affirming the principle of the *Gentile* case said, pp. 324-5:

> "This is not a case where a general law is required by the express terms of the constitution. In *Gentile* v. *The State*, 29 Ind. 409, we held, overruling *Thomas* v. *The Board of Commissioners of Clay County*, 5 Ind. 4, that 'it is for the legislature alone to judge whether a law on any given subject, not enumerated in section twenty-two of the constitution, can be made applicable to the whole State.'
>
> "Under this construction, doubtless, special powers might be conferred on any city within the State, as the members of the legislative body, acting under their oaths, might deem the special circumstances of the case required."

In *Mode* v. *Beasley*, 143 Ind. 306 (1896), the Indiana supreme court considered an act providing for the relocation of

a county seat. It was held that section 22 was not involved and the court then said, p. 315:

> "* * * that the enactment of local laws is not forbidden by the two sections of the constitution referred to except on the seventeen subjects enumerated in the twenty-second section and except on other subjects where a general law can be made applicable. And it was further adjudged in that case (*Gentile* v. *State*) that the question whether a general law on such other subjects can be made applicable and of uniform operation throughout the State, rests exclusively in the legislative judgment and discretion, which cannot be reviewed by the courts; and that when the Legislature has determined the question by enacting such a law, that is final and conclusive on that subject."

And in *Smith* v. *Indianapolis Street Ry. Co.*, 158 Ind. 425 (1901), the Indiana supreme court said, p. 438:

> "The fact that the General Assembly enacts a special or local law not comprehended within said section 22 is *per se* a legislative declaration that a general law cannot be made applicable."

See also:

Johnson v. *Board of Commissioners*, 107 Ind. 15 (1886).

School City of Marion v. *Forrest*, 168 Ind. 94 (1906).

Young v. *The Board of Commissioners*, 137 Ind. 323 (1893).

These decisions effectually dispose of any claim that the proviso of section 5 is invalid as a local or special law.

b.

The Equal Protection Clause of the Fourteenth Amendment Does not Inhibit the Proviso of Section 5 of the Moorhead Act.

Counsel for respondent, in his assignment of errors in the circuit court (R. 85), claims that the proviso of section 5 is invalid as violating the fourteenth amendment to the con-

stitution of the United States. Evidently the equal protection clause is the one relied on. Apparently counsel intends to suggest that by reason of the proviso persons desiring to enter into motor vehicle common carrier service in cities within the terms of the proviso do not have the same right to do so if public convenience and necessity demands competing service as have persons desiring to give such service in other municipalities. This suggestion disregards the facts. Such possible objection is carefully guarded against in the proviso. The decision of the municipal authorities upon the question of public convenience and necessity is subject to review by the courts. The legislature has said after providing that the question of the necessity for competing service shall be determined by the municipal authorities:

> "* * * but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within 20 days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the supreme court."

The unsoundness of any suggestion that the state may not delegate to different tribunals the power to determine similar questions was recognized as untenable by this court in *Springfield Gas and Electric Company* v. *City of Springfield*, 257 U. S. 66, 70 (1921).

It has been expressly held by this court that nothing in the fourteenth amendment requires uniformity throughout an entire state in the instrumentalities of governmental control. In *Missouri* v. *Lewis*, 101 U. S. 22 (1879), this court met and disposed of the suggestion made by respondent in this case. It said, pp. 31-2:

> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. * * * If diversities of laws and judicial proceedings may exist in the several

states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state. * * * Diversities which are allowable in different states are allowable in different parts of the same state."

c.

The Proviso Does Not Violate Section 19 of Article IV of the Indiana Constitution.

Counsel for respondent finally claims that the proviso of section 5 violates section 19 of article IV of the Indiana constitution in that the proviso is not indicated by the title of the act (R. 85).

Section 19 of article IV of the Indiana constitution provides:

"Every act shall embrace but one subject and the matters properly connected therewith, which subject shall be expressed in the title."

The title to the Moorhead act is:

"AN ACT entitled 'An Act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, and supplemental to an act entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and declaring an emergency.'"

The statute enacted under this title provides for control by governmental authorities over motor vehicle common carriers. The title to the act says that the act is for the purpose of regulating common carriers by motor vehicle. The act does exactly that thing. The title shows that the act is supplementary to the Shively-Spencer utility commission act. The supplemental act as well as the original act fixes the control of public utilities, determining what powers and control municipal agen-

cies have and what powers and control the public service commission has. Certainly there is nothing in the title to the Moorhead act or in the constitution of Indiana which makes it necessary that the regulatory powers of municipal agencies be set out in one act and that the regulatory powers of the public service commission be set out in another act.

The Moorhead act does exactly what it says. It provides for the regulation of motor vehicle common carriers operating in Indiana. It would be difficult to formulate a more comprehensive title for the act, or to draft one, more succinctly setting forth its substance and purpose. The act is an act regulating "*certain carriers*" for hire and is supplementary to the Shively-Spencer act.

The Indiana supreme court has frequently passed upon the requirements of section 19. The Moorhead act is clearly within the limits of these requirements.

The controlling principles have been thus plainly stated in *Maule Coal Co.* v. *Partenheimer*, 155 Ind. 100 (1900), pp. 106-7:

> "To express the subject of a statute in the title, in compliance with the requirement of the Constitution, no particular form or terms are exacted, nor is it essential that such subject be expressed with precision. The title will sufficiently conform to the command of the Constitution if it be so framed and worded as fairly to apprise the legislators, and the public in general, of the subject-matter of the legislation, so as reasonably to lead to an inquiry into the body of the bill. The constitutional requirement may be interpreted to mean that the act and its title must correspond, not literally but substantially, and such correspondence is to be determined in view of the subject-matter to which the legislation relates. *Benson* v. *Christian*, 129 Ind. 535; *State* v. *Kolsem*, 130 Ind. 434, 14 L. R. A. 566; *Lewis* v. *State*, 148 Ind. 346; *Gustavel* v. *State*, 153 Ind. 613; *McCommons* v. *English & Co.*, 100 Ga. 653, 28 S. E. 386.
>
> "In *Lewis* v. *State, supra*, we said: 'The degree of particularity with which the title of an act is to express the subject thereof is not defined by the Constitution, and

rests with the legislature. Courts, in this respect, are inclined to entertain and adhere to a liberal rule, and will not condemn an act of the legislature for the reason alone that the subject thereof is not as fully expressed as it otherwise might have been.'

"If we even entertained a reasonable doubt as to whether the subject of the act in question was as clearly expressed in its title as the Constitution required, in obedience to a well-settled rule, we would be bound to resolve such doubt in favor of the validity of the statute."

And in *Clark* v. *Darr*, 156 Ind. 692 (1901) this constitutional requirement was again explained, p. 697:

"If the title of an act covers a general subject, it is sufficient, and is not open to objections, because it does not proceed further and mention all of the germane matters or details intended to be embraced in and provided for by the act itself. *Bright* v. *McCullough*, 27 Ind. 223; *State* v. *Kolsem*, 130 Ind. 434, and cases cited, 14 L. R. A. 566; *Central Union Tel. Co.* v. *Fehring*, 146 Ind. 189; *Maule Coal Co.* v. *Partenheimer*, 155 Ind. 100."

In *State* v. *Arnold, et al.*, 140 Ind. 628, (1894), the Indiana supreme court asserted, p. 632:

"The criterion is this: If the title fairly gives such notice so as to reasonably lead to an inquiry into the body of the bill, it is all that is necessary. It need not amount to an abstract of its contents."

And in *Marion, B. & E. Traction Co.* v. *Simmons*, 180 Ind. 289 (1913), it was said, pp. 290-1:

"* * * if the title covers a general subject, matters germane to such subject may be included in the act, although not specifically mentioned in the title. Nor is it necessary that details be set out in such title."

In *Mull* v. *Indianapolis etc. Traction Co.*, 169 Ind. 214 (1907) the court said, p. 222:

"'The courts will not resort to a critical construction of the title in order to hold a statute unconstitutional.

> On the contrary, the language of the title is in all cases given a liberal interpretation, and the largest scope accorded to the words employed that reason will permit in order to bring within the purview of the title all the provisions of the act.' "

Furthermore in *Western Union Telegraph Co.* v. *Braxton*, 165 Ind. 165 (1905), the Indiana supreme court said, p. 168:

> "Furthermore, it should be borne in mind that the general subject of the proposed legislation is all that properly belongs to the title of an act, and that the title's exclusive office is to apprise those who shall be called on to vote upon it as to what that subject is. The details and means by which it is proposed to make the law effective in accomplishing its purpose must be looked for, not in the title, but in the body of the bill. Constitution Art. 4, sec. 19."

The proviso of section 5 is relative to the very subject matter named in the title. It deals with public regulation of certain carriers by motor vehicle. It deals with the subject of the title just as much as any of the other provisions of the act. Clearly any contention as to the unconstitutionality of the proviso by reason of the requirements of section 19 of article 4 of the Indiana constitution, must be cast aside.

The proviso of section 5 being effective in Hammond, respondent has no privilege to operate an intra-state common carrier service within the limits of Hammond without first obtaining a franchise from the city. Respondent has never secured nor attempted to secure this franchise. The certificates upon which respondent relies are wholly void. Respondent is unlawfully operating within petitioner city in direct and unauthorized competition with the local franchised carrier. For this reason alone respondent can not have an

standing in a court of equity to protect its illegal intra-state operations. Respondent has come into equity with unclean hands. At the instance of respondent, the court will not pass upon the validity of the ordinance as enforced against its illegal intra-state operations. Even though the ordinance were invalid, even though it were enacted in excess of the city's power, respondent, an unlawful operator, cannot procure an injunction against its enforcement.

Uniformly, courts of equity have taken this view. This position is well illustrated by the supreme court of Indiana in *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Town of Crothersville,* 159 Ind. 330 (1902). In that action plaintiff filed its bill in equity to enjoin the destruction of its stock pens by the board of health and the marshal of Crothersville. The town trustees, acting as a board of health, ordered the abatement of the pens. Plaintiff contended that the act of the trustees was invalid because of a vacancy in the board, and, further, that under the law the board had no power to enter the order and that, if granted the power by the state, their act was in violation of the federal constitution. The Indiana supreme court refused to consider the question of the validity of the order. It said, pp. 336-7:

> "The view we take of this case renders it unnecessary for us to determine either of these contentions of appellant.
>
> It is a well-settled maxim that he who comes into equity must come with clean hands. Here appellant, under the facts found, seeks the aid of equity to enjoin the appellees from abating a public nuisance maintained by it, on the ground that they have no right to abate it. To grant such relief to appellant, who is maintaining the public nuisance, would be contrary to the well-settled principles of equity."

City of Louisville v. *Louisville Home Telephone Co.,* 279 Fed. 949, 960 (1922).

Baker v. *City of Grand Rapids,* 142 Mich. 687, (1906).

Jose v. *Utley*, 185 Cal. 656, (1921).

Slovanian Association v. *City of Portland*, 111 Ore. 335, (1924).

Village of Cedar Springs v. *Schlick*, 81 Mich. 405, (1890).

Clearly, then, the only complaint which respondent can be heard to make against the validity of ordinance 1945 is its complaint as an interstate carrier that the ordinance, in regulating the manner in which motor vehicle common carriers for hire may use the city streets and classifying between lawfully operating local carriers and interurban carriers (in case of respondent, an interstate interurban carrier), unduly burdens interstate commerce. We are confident that this contention has been adequately refuted by the arguments already made.

CONCLUSION.

The circuit court of appeals in its decision held invalid as applied to all the motor bus operations of respondent, each of the provisions made by petitioner in ordinance 1945, for the regulation of common carrier traffic upon its streets. That decision unduly and improperly invades the power of the municipality to legislate for the local welfare.

We are confident that the argument advanced in this brief establishes beyond question that the acts of petitioner are not in excess of its power and are not violative of any federal or state constitutional restriction. It necessarily follows that the decision of the circuit court must be reversed.

We can not stress too strongly the serious consequences which must necessarily result not only to petitioner but to every other municipality if the ruling of the circuit court should stand. That decision in practical effect operates as a mandate to petitioner to allow respondent and every other motor bus operator the unrestricted use of any street within the city. This is true because the circuit court has based its

decision not upon any particular defect of wording or phraseology in the present ordinance but upon a lack of power in the municipality, under the circumstances disclosed by the record, to regulate. Surely with the condition of congestion shown by the record to exist, the need of municipal regulation cannot be open to real dispute. If in such a situation, regulation will be set aside by the courts, local authorities are powerless to protect and provide for the general welfare.

The principles upon which this case must be reversed are basic and fundamental. If we have been unduly minute in setting forth these principles, which seem almost uncontrovertible, we trust this court will overlook this fact because of the potential dangers of the present decision. The opinion of the circuit court of appeals in this case necessarily limits to an unwarranted degree the power of the state or its municipal agent to regulate and control in a matter essentially local and necessarily best known to local authorities. It contracts, to a wholly unwarranted extent, the scope of freedom of state action permitted by the fourteenth amendment. It gives to the fourteenth amendment a limiting power upon state action such as has never been recognized by this court. It departs from a method of approach that has proved itself upon repeated application,—a test that it is essential to maintain if legislatures and municipal agencies are not to be unduly restricted and hampered in their functions by the courts.

Doubly unfortunate at the present moment is the departure from these principles in a decision involving control of the manner of use of the highways. Day by day, with rapidly increasing traffic, our highways, unless regulation be had, become less capable of performing their function in the development of our social and industrial life. The growing need for adjustment of privileges in the use of the American highway rises more distinctly with each passing day. In the multitude of conflicting demands, the perfect adjustment will not always be reached at each attempt. Time and experience, supplemented by the best judgment of those familiar with local

conditions, alone can make possible a satisfactory solution of the intricate problem of balancing conflicting demands and needs. If constitutional provisions are to be so twisted and expanded as to prohibit these experiments, then there will inevitably follow atrophy of the legislative brain.

Against this judicial interference with the legislative process, this court, speaking through Mr. Justice McKenna, has voiced an admirable warning:

> "But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal." *Bunting v. Oregon*, 243 U. S. 426, 437-8 (1917).

We are confident that this court will heed that warning in deciding the case at bar.

Petitioner respectfully submits that the decree of the circuit court of appeals in this case must be set aside, and the decree of the district court affirmed.

Respectfully submitted,

C. B. Tinkham,
Louis T. Michener,
Gerald Gillett,
Attorneys for Petitioner.

APPENDIX A.

STATUTORY PROVISIONS.

a.

Acts of Indiana 1905, c. 129.

AN ACT concerning municipal corporations.

Common Council—General Powers.

Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:

* * *

Thirty-first. To prevent immoderate and careless riding or driving. To regulate the use of streets and alleys by vehicles, and to designate the kind of conveyance and vehicles that may not be used on certain named streets that have been improved, and designate hours for the use of such streets by certain specified classes of vehicles. To prevent the encumbering of streets, alleys, squares, sidewalks and crossings with building, fence or other structure, vehicles, horses or any substance or material whatever interfering with the free use of the same, and to compel the removal of any such obstructions. To regulate the speed of horses, wheeled and other vehicles, cars, and locomotives. To regulate and protect all bridges, culverts, tunnels, viaducts, aqueducts, sewers, canals and hydrants, wholly or partly in such city; and to prohibit digging in such streets, alleys or public places, or in any way injuring, disturbing or making holes in the surface thereof. To regulate the use of sidewalks and prohibit the use of vehicles thereon, and regulate all structures in, under or over the same; and to require the owner or occupant of premises to keep the sidewalks in front of the same free from snow and other obstructions, and to prescribe hours for cleaning the same. To regulate and prevent the throwing or depositing of sweepings, dust, ashes, offal, dirt, garbage, paper, hand bills, slops, liquids or any other materials into any streets, alleys or public places. To regulate and prevent the use of streets, sidewalks and public places for signs, sign posts, awnings, posts, poles, horse troughs,

scales, steps, railings, entrances or racks; or for posting hand bills and advertisements; or for the placing or piling of goods, boxes or other materials, or the display of goods, wares and merchandise. To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or hand bills on the streets, alleys, or public places. To regulate and prevent the flying of flags, banners or signs across the streets, or from houses or other buildings. To regulate the numbering of houses and lots, and to compel the owners to re-number the same, or, in default thereof, to authorize and require the same to be done by the board of public works or other proper authority at the owner's expense, such expense to constitute a lien upon the property which shall be enforcible as may be provided by ordinance. To name or change the name of any street or park. To regulate the making of private connections with sewer, gas, water and other like pipes and public conveniences, and to compel owners of property to bring such connections inside the curbs of streets before the permanent improvement thereof; and, on default of the owner's making such connections, to authorize the proper city officials to do so at the owner's expense, and to make such expense a lien on the property, collectible in the same manner as expenses for other street and sewer improvements; and to authorize the appointment and fix the compensation of a street commissioner or other necessary officers and assistants to keep all streets and alleys clean and free from obstructions to public travel, such street commissioner and other officers in cities of the first, second, third and fourth classes to be appointed by and subject to the direction of the board of public works, and, in cities of the fifth class, to be appointed by the mayor and be subject to the orders of the common council.

Thirty-second. To regulate, tax and license coaches, hacks, drays, automobiles and all other vehicles.

* * *

Thirty-eighth. To license, tax and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, bill posters and all other persons pursuing like occupations for pay or hire, and to prescribe their compensation, and revoke any license for violation of such ordinance.

* * *

Fifty-third. To carry out the objects of the corporation not hereinbefore particularly specified.

* * *

Streets, Alleys, Water Courses, Etc.—Control.

Sec. 267. Every city and town, except when otherwise provided by law, shall, have exclusive power over the streets, alleys, water courses, sewers, drains, bridges and public grounds within such city or town; * * *

* * *

Obstruction of Streets and Public Places.

Sec. 269. Every city and town shall have exclusive power, by ordinance, to control and care for its streets, alleys and other pubic places, and to prevent the obstruction or incumbrance of any such street, alley or other public place, so as to impede the free use of the same for its proper purposes, and to prevent any person from going upon any sidewalk with any vehicle or animal, except in the necessary act of crossing.

b.

Acts of Indiana 1911, c. 104.

AN ACT to amend sections 253, 254, 256 and 257 of an act entitled "An act concerning municipal corporations," approved March 6, 1905, and declaring an emergency.

* * *

Contract for Public Utilities—Limit—Purchase.

Sec. 2. That section 254 of the above entitled act be, and the same is hereby amended to read as follows: Section 254. Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities or to build or extend railroads, interurban or street car lines, telegraph or telephone lines, drainage or sewerage system, *or other public conveniences into or through such city or town;* and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street car, telegraph or telephone services, *or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants: Provided,* That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light,

upon or along the streets of such city or town for a term longer than twenty-five years: *and, Provided further,* That before any such contract shall be made by any city of the first, second, third, or fourth class, such contract shall be first agreed to by the board of public works of such city, after which agreement such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city. For the purpose of aiding in the erection or extension of any such public utilities and convenience, any city or town is authorized to become a part stockholder by subscribing to the capital stock thereof in any such corporation so contracting to furnish the city or town and its inhabitants with water, motive power, heat, drainage, sewerage, light and other accommodations aforesaid. And such city or town shall have the power to borrow money to pay for the stock so subscribed or to pay the purchase price for any such gas, electric light, heat or power plant, sewerage or drainage system or other public convenience, and the common council of such city or board of trustees of such town may issue the bonds of such city or town payable at such time or times as such common council or board of trustees may direct, and bearing interest at a rate not exceeding six per centum per annum, payable annually or semi-annually, and may negotiate and sell the same at not less than the face value thereof. The proceeds of such bonds shall be applied only to the payment of the stock so subscribed or to the payment of the purchase price of such gas, electric light, heat or power plant, sewerage or drainage system or other public conveniences: *Provided, however,* That the denominations, time and place of payment of and interest on said bonds shall be in accordance with the terms and provisions of section two hundred and forty-nine of this act.

c.

Acts of Indiana 1913, c. 76.

AN ACT concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission.

New Franchises—When Granted.

Sec. 97. No license, permit or franchise shall be granted to any person, copartnership or corporation to own, operate, manage or control any plant or equipment of any public utility in any municipality where there is in operation a public utility engaged in similar service under a license, franchise or permit without first securing from the commission a declaration after a public hearing of all parties interested, that public convenience and necessity require such second public utility. Any existing permit, license or franchise which shall contain any term whatsoever interfering with the existence of a second public utility is hereby declared to be against public policy and is hereby amended in such manner as to permit a municipality to grant a license, franchise or permit for the operation of such second public utility pursuant to the provisions of this act.

Must Organize Under Laws of State.

Sec. 99. No license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Indiana or to a citizen of such state.

Municipal Council—Powers.

Sec. 110. Every municipal council shall have power, (a) to determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistent with this act upon which such public utilty may be permtted to occupy the streets, highways or other public property within such municipality, and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in section 57 the commission shall set a hearing as provided in sections 57 to 71 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. (b) To require of any public utility by ordinance or otherwise

such additions and extensions to its physical plant within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the commission as provided in subdivision (a) of this section. (c) To provide for a penalty for noncompliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof. (d) The power and authority granted in this section shall exist and be vested in said municipalities anything in this act to the contrary notwithstanding: *Provided, however,* Whenever after a request by petition in writing of any public utility, the city or other political subdivision or other body, having jurisdiction of the matter, shall refuse or fail for a period of thirty (30) days, to give or grant to such public utility permission and authority to construct, maintain and operate any additional construction, equipment, or facility reasonably necessary for the transaction of the business of such public utility, and for the public convenience or interest, then such public utility may file a petition with said commission for such right and permission, which petition shall state with particularity the construction, equipment or other facility desired to be constructed and operated, and show a reasonable public necessity therefor, and also the failure or refusal of such city, political subdivision or other body to give or grant such right or permission; and the commission shall thereupon give notice of the pendency of such petition, together with a copy thereof, to such city or other political subdivision or body of the time and place of hearing of the matter set forth in such petition; and such commission shall have power to hear and determine such matters and to give or grant such right and permission and to impose such conditions in relation thereto as the necessity of such public utility and the public convenience and interest may reasonably require.

d.

Acts of Indiana 1913, c. 300.

AN ACT defining motor vehicles and providing for the registration, numbering and regulation of same, defining chauffeurs and providing for the examination and licensing thereof, providing for punishment for the violation of any of the provisions of this act.

Local Ordinances Prohibited.

Sec. 17. * * * *Provided,* That nothing in this act contained shall be construed as effecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles which are used within their limits for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions of this act.

e.

Acts of Indiana 1925, c. 46.

AN ACT entitled "An Act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, and supplemental to an act entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and declaring an emergency."

Motor Vehicle Carriers—Declared to be Public Utilities.

Section 1. *Be it enacted by the general assembly of the State of Indiana,* That every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, that now or hereafter may own, operate, manage or control any motor vehicle, except as hereinafter provided, for the purpose of transporting passengers or property for compensation as a common carrier upon any of the public highways of the State of Indiana is hereby declared to be a public utility within the meaning of the act of the general assembly of the State of Indiana entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service com-

mission," approved March 4, 1913, and, except as herein provided, subject to all the terms and provisions of said act, in so far as the terms and provisions of said act may be reasonably applicable to such carriers.

Public Service Commission—Certificate of Convenience and Necessity—Existing Carriers.

Sec. 2. No motor vehicles, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until after there shall have been obtained from the public service commission of Indiana a certificate declaring that public convenience and necessity require such operation, and no certificate shall be issued except as hereinafter provided until after a public hearing and a consideration of the service, if any, rendered in the territory of the proposed motor vehicle operation by other motor vehicle common carriers. Such commission is empowered to adopt rules and regulations to govern applications for certificates of convenience and necessity and hearings thereon: *Provided, however*, That the owner of any motor vehicle common carrier service which has been lawfully operated over a fixed route with a substantially regular schedule, upon the highways of the state for a period of ninety days immediately prior to the taking effect of this act and is engaged in such operation at the time of filing application therefor, shall receive from the public service commission a certificate of convenience and necessity to continue such operation, upon submitting to the public service commission within thirty days from the taking effect of this act, verified proof in writing of such continued service and complying with the provision of section 3 of this act, and any certificate owned, held or obtained by any such carrier may be sold, assigned, leased, bequeathed or transferred as other property upon approval by the commission.

Damages Arising from Negligence—Bond, Indemnity, Insurance.

Sec. 3. No motor vehicle, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until there shall have been filed with the public service commission of Indiana, a bond, indemnity undertaking or policy of insurance, executed by a company (,) mutual association or reciprocal exchange legally authorized to execute such instruments in the

State of Indiana and to the approval of said commission, guaranteeing the payment of all damages which may result from any and all accidents due to negligence in the use or operation of such motor vehicle, which bond, indemnity undertaking or policy shall be payable to the State of Indiana, for the benefit of persons who may suffer personal injuries or property damages on account of such negligence, and shall be in such amount as shall be fixed by such commission at the time of granting a certificate of convenience and necessity for the operation of such motor vehicle.

Definition of "Motor Vehicle" and "Public Highway."

Sec. 4. The term "motor vehicle" as used in this act means any automobile or other self-propelled vehicle not operated or driven upon fixed rails or track, including any trailer thereto attached; and the term "public highway" as used in this act means any public road, street, avenue or alley in the State of Indiana.

Vehicles to Which Act Is Inapplicable—Local Control.

Sec. 5. None of the provisions of this act shall apply to the owning, operation, management or control of taxicabs, hotel buses, funeral buses or school buses or to owning, controlling, operating or managing motor propelled vehicles the major use of which is for private business of the owners and the use of which for hire is only casual or occasional or under special contract or arrangement: *Provided, further,* That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the supreme court. A taxicab as the term used herein means a motor vehicle while being used for the performance of a contract for the transportation of a passenger or passengers for hire to and from points chosen or designated by the passenger or passengers and running over any available route between

such points; but not at the time being operated over or along a definite, advertised, announced or substantially fixed route from, to or between definite or substantially fixed terminals, locations or districts, or according to substantially fixed or announced times or interval of arrival or departure; and a hotel bus, as the term is used herein, means a motor vehicle operated by a hotel company, owner or proprietor in the conveyance of guests between such hotel and a railroad or interurban station.

Steam or Electric Carriages, Motor Vehicles of.

Sec. 6. Any motor vehicle engaged in transporting persons or property upon any of the public highways of the state for any steam or electric common carrier between points on the railroad of such carrier or elsewhere, shall be regarded as a motor vehicle owned, operated, managed or controlled for the purpose of transporting passengers or property for compensation as a common carrier within the meaning of this act.

Construction of this Act.

Sec. 7. Each section of this act is independent of each of the other sections, and adjudication that any provision of this act is invalid shall not affect the validity of any other provision hereof, but such other provisions shall be and remain in full force and effect.

Penalties.

Sec. 8. Any person, firm or corporation which shall violate any of the provisions of this act or fail or refuse to obey any lawful order of the public service commission of Indiana made hereunder shall, on conviction, be fined not less than ten dollars or more than one hundred dollars for each offense, and each day such violation shall continue shall constitute a separate offense.

Legal and Equitable Remedies Available for Enforcement.

Sec. 9. All legal and equitable remedies of a civil nature to enforce the provisions of this act or of any lawful order, rule or regulation made pursuant hereto may be used by said commission of any person or corporation having a special interest in such enforcement.

Highway Commission—Other Authorities—Jurisdiction, Powers.

Sec. 10. This act shall be supplementary to the act entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913: *Provided, however,* That none of the provisions of this act shall operate to deprive the state highway commission of Indiana or any other public authorities of any jurisdiction it or they now has or have or which may hereafter be conferred upon it or them over the public highways of the state, nor prevent said state highway commission of Indiana or other authorities from suspending, at any time, the right of motor buses to operate on any public highway where necessary to preserve said highway.

f.

Acts of Indiana 1925, c. 213.

AN ACT providing for the registration and licensing of motor vehicles, motor bicycles, tractors, trailers and semi-trailers, for the regulation of the use and operation thereof on the public highways, defining chauffeurs and providing for the examination and licensing thereof, the suspension and revocation of licenses, and the transfer of ownership, requiring the keeping of certain records of motor vehicles, motor bicycles and motor trucks for which storage, supplies or repairs are furnished, providing that liens may be taken thereon, and prescribing penalties for the violation thereof.

Municipal Regulations—City and Town Licenses.

Sec. 45. Except as herein otherwise provided, no city, town or other municipal corporation shall have any power or authority to make any ordinance, by-laws or resolution, limiting or restricting the use or speed of motor vehicles or motor bicycles, and no ordinance, by-laws or resolution heretofore or hereafter made by any city, town or other municipal corporation within this state, by whatever name known or designated, in respect to or limiting the use of motor vehicles or motor

bicycles, shall have any force, effect or validity, and all such ordinances, by-laws and resolutions are hereby declared to be of no validity or effect. *Nothing in this act contained shall be construed as affecting the power of cities, towns and other municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles which are used within the limits of such municipal corporations for public hire, or from making and enforcing reasonable traffic and other regulations, except as to rates of speed, not inconsistent with the provisions of this act.* A license issued by any city or town for any motor truck or motor driven commercial vehicle used for hire shall be valid in every city and town of the state for and during the year for which such license is issued, and only one such city or town license shall be required for any such motor vehicle for any one year.

APPENDIX B.

PROVISIONS FROM THE CONSTITUTION OF THE STATE OF INDIANA.

a.

Article I, Section 23.

23. The general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

b.

Article IV, Section 19.

19. Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

c.

Article IV, Sections 22 and 23.

22. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

Regulating the jurisdiction and duties of justices of the peace and of constables;

For the punishment of crimes and misdemeanors;

Regulating the practice in courts of justice;

Providing for changing the venue in civil and criminal cases;

Granting divorces;

Changing the names of persons;

For laying out, opening, and working on, highways, and for the election or appointment of supervisors;

Vacating roads, town plats, streets, alleys and public squares;

Summoning and impaneling grand and petit juries, and providing for their compensation;

Regulating county and township business;

Regulating the election of county and township officers, and their compensation;

For the assessment and collection of taxes for (the) state, county, township or road purposes;

Providing for supporting common schools and for the preservation of school funds;

In relation to fees or salaries; except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required. (As amended March 14, 1881.)

In relation to interest on money;

Providing for opening and conducting elections of state, county or township officers, and designating the place of voting;

Providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities by executors, administrators, guardians or trustees.

23. In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state.

APPENDIX C.

Opinion rendered by Honorable Maurice C. Crites, Judge, Room No. 2, Lake superior court, in the case of *Twin City Bus Lines, Incorporated* v. *City of Hammond* (Lake superior court, Case No. 29374).

The Court: I had intended, if I had time, to write an opinion in this case, because of the many interesting questions that are involved. I do not think it would be fair to leave the matter undecided until after the change is made in the court, and I thought that the better thing to do was to decide it to the best of my ability, in time to permit an appeal to be taken while I could sign the record. I do not want to involve the record in any way by a change in the case from one room to another. I have not been able to write an opinion. However, I think it is fair that I should give my reasons for the position I am taking; and, while I know what one says from the bench usually does not read very well, at the same time I hope that what I shall say may be of some assistance to you in the future. I know whichever way I decide the case will not settle the question,—that it will only be settled eventually by the Supreme Court of this State, if not by the United States Supreme Court.

First, I should like to explain what I felt my attitude should be, because this is an application for a temporary injunction rather than a permanent one.

The evidence is not conflicting in any sense. That, it seems to me, is important in the determination of a case. The questions that determine this case are legal questions mostly. I cannot see any difference between a temporary injunction

and a permanent injunction, if the action of the court is determined by his opinion on the legal questions that are involved.

The whole thing is predicated on what the plaintiff conceived to be its right to operate under these Certificates of Convenience and Necessity issued by the Public Service Commission, without any authority from the City of Hammond and upon the theory that the ordinances are void; that arrests under them interfere with the rights of the plaintiff that are guaranteed to it because of these Certificates of Convenience and Necessity.

The action, of course, is an injunction, which seeks equitable relief,—it is on the equity side of the court.

If I understand the law correctly, you cannot have an injunction to prevent the enforcement of an ordinance of a city simply because the ordinance is void. If that were the only thing that there was in the case, the ground for interference by a court of equity, would not be justified. The same grounds that you would be using for relief in an action in equity are available in the defense of these ordinances.

I found the statement in an Illinois case—I think it is in the 222 Illinois (it is reported in the 78 N. E. 890) which dealt with this question of when you had a right to go into a court of equity for injunctive relief against void ordinances. The rule is laid down in Corpus Juris, Vol. 32, p. 265. These citations that I give, may be the starting point, if you care to follow up this line of reasoning any further than what I give. The rule as I found it is in these words:

The mere validity of an ordinance under which prosecutions are brought, without additional circumstances, bringing the case under some recognized general equity jurisdiction, affords no ground for the issuance of an injunction to restrain prosecutions under them. In such cases the remedy is at law in defense of such prosecutions.

The further reasoning is, that if the ordinances are valid, a court of equity would be powerless to enforce the provisions of the ordinance, or its penalties. All that the court could do would be to prevent, for a time, the exercise of the functions of government.

So, if we concede that the ordinances are invalid for the purpose of our reasoning in this case (although I do not want to be understood as holding them invalid,—we will assume that they are for the purpose of this reasoning), still that fact alone would not authorize injunctive relief.

In order to authorize injunctive relief, you have to have an interference with a plaintiff's right, either a property right or some inherent right. So it would not be sufficient simply to say that the ordinances are void. It seems to me that you must go further and determine the nature of the right plaintiff has to operate upon the streets in question.

If you could say that the steps that the plaintiff has taken do create a property right, then I would concede that, if the ordinances are void, prosecutions under them should be enjoined; but first I think it has to be determined that they are property rights, or at least that the plaintiff has an inherent right to do the things for which he seeks to stop the interference.

Now, I found, in addition to the authorities which you gentlemen cited me that Elliott (Elliott on Roads and Streets, 4th ed. Vol. 4, Sec. 1171.3) has written a chapter on motor bus and motor vehicle transportation. It is not found in the earlier editions. There is also some very helpful treatment on the subject found in Pond, on the subject of utilities.

This is the statement that Elliott gives, and I think it is in perfect harmony with the *Frick* case and the *Denny* case, which you cited and argued quite at length. I haven't the book before me, but in substance this is the rule that Elliott lays down: The right to travel on a highway in the ordinary

way and course of life as one of the general public, is a different thing from the right to make the highway a place of business for private gain by running motor busses for hire. The former use is ordinary and common to all, while the latter is special and extraordinary, and is in the nature of a privilege or permission, which is peculiarly subject to regulation, and generally may be either granted or withheld by the authorities given power over the subject. No one has an inherent and constitutional right to use a highway as a place to carry on a private business and make a profit therefrom, and if he does so without obtaining a franchise so to do, he has no property right to continue doing it.

I think the *Frick* case is cited in this work of Elliott. I believe the *Denny* case was decided after the work was written. But, in any event, that rule as laid down by Elliott, is in perfect harmony with the *Frick* case.

So that, unless it can be said that the Moorhead Law changes this rule, it seems to me that you will have to start with the assumption that there isn't any right of the plaintiff to use the highway to carry on the business of motor bus transportation for hire without a franchise, and no right to continue doing it.

Now, that was the status of the law, as I understand it, prior to the enactment of the Moorhead Act.

Of course, the position of the plaintiff in this case, is that the Certificates of Convenience and Necessity issued by the Public Service Commission, amount in effect to a franchise and that they are property rights.

That position, as I understand it, was predicated largely on the language in Section 2, which, in speaking of these certificates says that "any certificate owned, held, or obtained by any such carrier, may be sold, assigned, leased, bequeathed or transferred as other property, upon approval by the Commission."

Now, if I understand Mr. Whinery's position, it was because of that provision that—

Mr. Whinery: The Oklahoma case that I cited, the *Tulsa* case, held that they were a property right, under a similar statute.

The Court: Of course, whether or not they are property rights, will have to be determined in each instance by the statute in force in the State in question.

I grant you that, to begin with, the State is the one that has authority over the highways, including at least, in Indiana, streets and alleys. You must start with the authority in the State. Now, they may delegate that authority to the local municipalities; they may delegate it to the Public Service Commission; they may first give it to the municipality and take it away from the municipality and give it to the Public Service Commission, or vice versa, or they may leave it in both. There is no rule that I know of that would prevent a state from leaving authority in both of these bodies, at least dividing the jurisdiction to a certain extent between the local authorities and the State authorities, in the form of a Public Service Commission.

Now, without reciting all of these statutes that were in force prior to the enactment of the Moorhead Law,—it does not seem to me that there is any dispute but that the city has control over its streets and alleys.

So, the question is, whether or not the Moorhead Law took that power away from the city and transferred it to the Public Service Commission.

Now, I may say, without prolonging this discussion too much, that I do not think it did. I have studied this Moorhead Law pretty carefully. The language that is used in Section 1 is negative in its character; and then, too, the last section cannot be overlooked. This Section 10 says: "This Act shall be supplementary to the Act entitled, 'An Act con-

cerning public utilities, creating a Public Service Commission, abolishing the Railroad Commission of Indiana, and conferring the powers of the Railroad Commission on the Public Service Commission,' approved March 4, 1913, provided, however, that none of the provisions of this act shall operate to deprive the State Highway Commission of Indiana, or any other public authority of any jurisdiction it or they now has or have, or which may hereafter be conferred upon it or them, over the public highways of the State,''—and then there is the further provision about keeping traffic off the highways where traffic is injurious to the highways.

Now, it seems to me, after a study of the language used throughout this entire act, even if you wipe out Section 5, which is the section in the act that we have had so much argument about here,—if you wipe that out and say that we will consider the whole act with Section 5 taken out, just as if it was not written there at all,—still, it seems to me that the intent of the legislature was never to take all the authority from the cities and towns over motor bus transportation and place it in the hands of the Public Service Commission, because it is a supplementary act, and it seems to me that what it really did was to put motor bus transportation under the Public Utilities Act, that is, the Act of 1913, the same as other utilities were, in that act.

Now, Section 110 of the Act of 1913, explicitly gives cities authority in matters where other kinds of utilities are involved; and I cannot see why there should be any difference between motor bus transportation and other public utilities. As a matter of fact, there is more reason, it seems to me, why local authorities should have control over motor bus transportation on its streets, than it should have over street cars, for instance, because the street car lines are in the middle of the streets, and street cars can only operate over a fixed track, while motor busses may come and go over all parts of the street, in fact, do; and as a matter of fact, I

think they could fairly be said, in some instances, to be more of a local problem than street car transportation is.

So, I am taking the position that even if Section 5 is taken out of the Act, that still I think cities and towns have something to say about motor bus transportation over their streets and alleys.

Now, I do not want to be understood by anything that I have said here as holding that Section 5 is invalid, because I do not see how that would help us any, if it were invalid. I am of the opinion that if Section 5 is invalid, then the whole act is invalid; and if Section 5 is valid, then the Public Service Commission has no authority to issue Certificates of Convenience and Necessity in this city.

So, it is my opinion, gentlemen, that these Certificates of Convenience and Necessity do not foreclose the city from all its jurisdiction over motor bus transportation over the streets. I think that any man, or any corporation that intends to go into the business of motor bus transportation, in order to comply with the law of this State, is required not only to get Certificates of Convenience and Necessity, but is also required to get consent from the city.

Mr. Whinery: How about the Shore Line? They do not have it; neither does the Calumet Motor Coach Company.

The Court: I am glad you asked me that, because I might have overlooked a statement that I think I should make. I do not think it is the function of the Court in this case to decide it on the strength or weakness of the Shore Line case at all. I do not pretend by this decision to say that the Shore Line has a franchise that is valid or not; I do not pretend to say that these ordinances are valid or not; because the position I am taking does not require me to pass upon those questions. I started with the assumption that they were void, and still reached the position that injunctive relief is not proper.

Mr. Whinery: You think, then, that we have an adequate remedy to continue to defend every time our boys are arrested?

The Court: I think this, Mr. Whinery, (I don't know whether I have made myself clear or not)—I think this, that you have not by your pleadings and your affidavits, established a right sufficient to come within the protection of a court of equity, when the only thing you can show, or do show, is a Certificate of Convenience and Necessity, issued by the Public Service Commission.

Mr. Whinery: Can those be attacked collaterally?

The Court: They do not have to be attacked collaterally. You still do not understand me; I do not say these are void. What I say is, you have not done enough—

Mr. Whinery: What do we have to do?

The Court: Why, you have to get the consent of the city to operate your private business on its streets.

The finding of the Court is: The Court finds for the defendants and denies the temporary injunction.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925

No. 1228

CITY OF HAMMOND, a municipal corporation,

Petitioner,

vs.

SCHAPPI BUS LINE, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

WILLIAM J. WHINERY,
Attorney for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925

No. 1228

CITY OF HAMMOND, a municipal corporation,

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The respondent respectfully submits that the petition of the City of Hammond for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is without merit, and should be denied for each of the following reasons, to-wit:—

THE PETITION IN THIS CASE FOR A WRIT OF CERTIORARI IS WITHOUT MERIT.

1. This case is not one which, under Rule 35, Clause 5 of this Court, wherein a writ of certiorari should be granted.

2. No sufficient special or important reasons appear either in the petition of the City of Hammond, filed herein, or in the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, justifying the granting of a writ of certiorari in this case.

3. The opinion and decision of the United States Circuit Court of Appeals is clearly right. (See: Printed Record, pages 101 to 105, Opinion.)

4. The ordinance of the City of Hammond, held void, and which is set forth in full in the opinion of the United States Circuit Court of Appeals, is void on its face, and the Court rightly so held.

See: Printed Record, pages 102 to 105.
Yick Wo v. *Hopkins,* 118 U. S. 356 (30 Law Ed. 220, at page 227).

5. The opinion and decision of the United States Circuit Court of Appeals for the Seventh Circuit, in holding the ordinance of the City of Hammond void, is right, and is in strict accord with all decisions of the Supreme Court of the State of Indiana wherein similar ordinances were involved, and likewise held void by the highest Court of the State of Indiana.

See: *Bessonies* v. *City of Indianapolis,* 71 Ind. 189, at pages 197 to 198.
Bills v. *City of Goshen,* 117 Ind. 221, at pages 225 to 227.
City of Richmond v. *Dudley,* 129 Ind. 112.
City of Plymouth v. *Schultheis,* 135 Ind. 339.
State v. *Gerhardt,* 145 Ind. 439, at pages 479 to 493.
City of Elkhart v. *Murray,* 165 Ind. 304.
Bouge v. *Bennett,* 156 Ind. 478, at pages 480 to 486.

6. The United States Circuit Court of Appeals for the Seventh Circuit, in its opinion, rightly held, that:

"We are of opinion that the ordinance cannot be sustained as a police regulation—and it is not claimed that it can be sustained upon any other theory."

(See: Opinion, Printed Record, pages 103 to 104.)

for the reason that said ordinance of the City of Hammond shows upon its face that the primary purpose of said ordinance is not regulation, with a view to safety, or to the conservation of the highways, but the prohibition of competition, and discrimination among persons engaged in the same business. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose, and in the same manner, and it leaves the determination of granting permission for such use to the uncontrolled, arbitrary discretion of the Board of Public Works of the City of Hammond. Such an ordinance, therefore, is void upon its face.

See: *Buck* v. *Kuykendahl,* U. S. Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions, No. 10, pages 301 to 303.)

Bush & Sons v. *Maloy,* U. S. Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pages 303 to 305.)

Cicero Lumber Co. v. *Cicero,* 176 Ill. 9 (68 Amer. St. Reps. 155, at pages 163 to 165).

See also: Indiana Cases cited under No. 5, *supra.*

7. The petitioner seeks, by its petition for a writ of certiorari in this court, to present questions entirely foreign to the decision and opinion of the United States Circuit Court of Appeals for the Seventh Circuit. This is not permissible in a petition for a writ of certiorari.

See: Printed Record, pages 101 to 105, Opinion.
Petitioner's Brief herein, pages 4 to 8.

8. The first point urged by the petitioner in its petition for a writ of certiorari is, that:

"The decree of the Circuit Court of Appeals for the Seventh Circuit is erroneous in the following particulars:

1. By its finding that respondent is a corporation of the State of Indiana;

whereas the pleadings aver, and the uncontradicted evidence is that, it is organized only in the State of Illinois."

See: Petitioner's brief, page 4, Point 1.

The United States Circuit Court of Appeals for the Seventh Circuit made no finding of facts in the instant case, and the word "Indiana" used in the opinion, to which objection is taken, is clearly a mere error in printing, and not an error on a question of law. Such a ground, urged for a writ of certiorari, is wholly without merit.

See: Printed Record, page 101, Opinion.
Petitioner's Brief, page 4, Point 1.

9. Said ordinance No. 1945 of the City of Hammond, held void by the United States Circuit Court of Appeals for the Seventh Circuit, attempts to deprive respondent, and others, of a common right on the public highways.

It is settled law, that, travelers, whether on foot or in carriages, have a right to stop a reasonable time by the roadside for their convenience. Hacks and omnibuses may stop to load and unload passengers. To receive and discharge passengers upon the public streets of a city is an essential and necessary part of the transportation, by automobile buses, of passengers from one place to another, and when this is being done in the usual and customary way under a permit regularly issued by the Public Service Commission of the State, as in the instant case, it is not within the power of a municipality to either prevent or prohibit it.

See: Volume 2, Elliott on Roads & Streets, 3rd Ed., Par. 1100.
Parker v. *City of Silverton*, Oregon Supreme Court, November 13, 1923, 220 Pac. 139 (31 A. L. R. 589, at page 593, Col. 2).

City of Tulsa v. *Thomas,* Okla. Supreme Court, April 24, 1923, 214 Pac. 1070.

Buck v. *Kuykendahl,* U. S. Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pages 301 to 303.)

Bush & Sons v. *Maloy,* U. S. Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pages 303 to 305.)

Cicero Lumber Co. v. *Cicero,* 179 Ill. 9 (68 Amer. St. Reps. 155, at pages 163 to 165.)

10. When a municipal ordinance of a regulatory nature, in contravention of the natural rights of individuals, is brought before a court for determination, the court must be able to see that it is not only reasonable, but that it will tend to promote the public health, morals, safety, or welfare, and that the means adopted are adapted to that end, and that it is impartial in operation and not unduly oppressive upon individuals.

See: Ruling Case Law, pages 805 to 806, Par. 112.

Again, an ordinance passed by a municipal corporation, which attempts to restrict the right of dominion, which individuals might otherwise exercise, without question such restriction must be according to a general or uniform rule, and not so as to make the absolute enjoyment of the individual depend upon the arbitrary will of the governing authorities of the town or city, and if such ordinance fails to furnish a uniform rule of action, and leaves the right of enjoyment or property subject to the despotic will of the municipal officers, who may exercise it in accordance with some principle which it would not be within the constitutional power of the state to sanction, or even so as to give exclusive profits or privileges to particular persons, such an ordinance is void for discrimination and is unreasonable.

See: Vol. 2, Dillon on Municipal Corporations, 5th Ed., Par. 598, at pages 934 to 935.
19 Ruling Case Law, page 813, Par. 118.

Yick Wo v. *Hopkins*, 118 U. S. 356 (30 Law Ed. pages 220 to 228).
Cicero Lumber Co. v. *Cicero*, 176 Ill. 9.
Bills v. *Goshen*, 117 Ind. 221.
Richmond v. *Dudley*, 129 Ind. 112.
City of Elkhart v. *Murray*, 165 Ind. 304.
Bessonies v. *City of Indianapolis*, 71 Ind. 189, at pages 197 to 198.

Respondent, therefore, most respectfully submits that the opinion of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is right, and that the petitioner's request for a writ of certiorari herein should be denied.

Most respectfully submitted,

WILLIAM J. WHINERY,
Attorney for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926

No. [redacted] 67

CITY OF HAMMOND, a municipal corporation,

Petitioner,

vs.

SCHAPPI BUS LINE, Incorporated,

Respondent.

RESPONDENT'S BRIEF

WILLIAM J. WHINERY,

Attorney for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926

No. 385

CITY OF HAMMOND, a municipal corporation,
Petitioner,

vs.

SCHAPPI BUS LINE, INCORPORATED,
Respondent.

RESPONDENT'S BRIEF

WILLIAM J. WHINERY,
Attorney for Respondent.

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IN THE

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No. 385

CITY OF HAMMOND, a municipal corporation,
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RESPONDENT'S BRIEF

"STATEMENT OF THE CASE"

(A) Nature of the Action.

This cause comes to the Supreme Court of the United States on writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. The petitioner to date, at least, has filed no brief except the brief filed in support of its petition for a writ of certiorari.

This cause came to the Circuit Court of Appeals for the Seventh Circuit from the United States District Court of Indiana on an appeal taken by respondent from said last named court from an order refusing to grant a temporary injunction.

The United States Circuit Court of Appeals for the Seventh Circuit heard the case fully and rendered an

opinion March 12th, 1926, reversing the order and decree of the United States District Court of Indiana, and directing that a decree, granting the injunction prayed for by respondent, be entered. The opinion of the United States Circuit Court of Appeals is reported in Volume 11, Federal Reporter, Second Series, page 940, and entitled: "Schappi Bus Line, Incorporated, Appellant v. City of Hammond, a municipal corporation, Appellee."

(B) Grounds on Which the Jurisdiction of This Court is Invoked.

The respondent filed its bill of complaint for an injunction in the United States District Court for the District of Indiana, Hammond Division, on July 28, 1925. (Rec. 1 to 27.) The cause was heard before the Honorable Thomas W. Slick, one of the Judges of said United States District Court for the District of Indiana, on the 6th day of August, A. D. 1925 on motion for a preliminary injunction, and further heard on August 17, A. D. 1925 (Rec. 27 to 29) and taken under advisement until the 14th day of September, A. D. 1925, (Rec. 32 to 33) on which latter date the cause was again taken under advisement by the Judge of said District Court until September 21, A. D. 1925, (Rec. 76 to 77) when the said Judge of said Court, having heard all the evidence, refused to grant said temporary injunction, and denied said temporary injunction prayed for by the plaintiff, to which rulings of the said Judge of said Court the plaintiff at the time duly excepted and prayed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit. (Rec. 76 to 77). The respondent herein perfected its appeal to said United States Circuit Court of Appeals for the Seventh Circuit in the form and manner required, (Rec. 77 to 99) and the cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit before the Full Court on Tuesday, January 26, A. D. 1926, and taken under advisement;

(Rec. 100) and, afterwards, on the 12th day of March, A. D. 1926, said United States Circuit Court of Appeals rendered its opinion in said cause, reversing the judgment of the District Court and directing it to enter a decree granting the injunction prayed for by respondent. (Rec. p. 100 to 106).

The respondent is a corporation organized under the laws of the State of Illinois, engaged chiefly in interstate commerce in the carrying of passengers for hire on, upon, and over the public highways of the states of Illinois and Indiana, between the city of Chicago in the state of Illinois and the city of Hammond in the state of Indiana, and to other points in the state of Indiana. The diversity of citizenship existing between the respondent and the petitioner gave to the United States District Court for the District of Indiana jurisdiction over the parties and the subject matter. (See: Bill of Complaint, Rec. 2 to 27).

The evidence introduced on the hearing for a preliminary injunction consisted of the following:—

(a) The verified bill of complaint for injunction. (Rec. 2 to 27).

(b) The answer of the defendant City of Hammond to the bill of complaint. (Rec. 29 to 32).

(c) Certificates of Public Convenience and Necessity numbered 324-M, 325-M, 326-M and 327-M issued by the State of Indiana through its Public Service Commission to the respondent, authorizing it to operate its motor vehicles as common carriers in the carrying of passengers for hire upon certain public highways in the State of Indiana. (Rec. 35 to 50).

(d) A certified transcript of the proceedings and judgment in cause Number 10624 in the City Court of Hammond, entitled: "City of Hammond v. Clarence E. Dome", where, in a suit brought to prosecute said Dome

under Ordinance Number 1945 of said City, the City Court of Hammond held such ordinance void. Upon objection this offered evidence was excluded by the Judge of the United States District Court. (Rec. 50 to 51).

(e) The certified copy of Ordinance Number 1945 of the City of Hammond, being an ordinance entitled: "An Ordinance Regulating and Routing Certain Vehicles for Hire and Prohibiting Their Use of Certain Streets within the City of Hammond". (Rec. 51 to 53). Said Ordinance Number 1945 was also set forth at length in the bill of complaint and alleged to be discriminatory and void, etc. (Rec. 15 to 27).

(f) The affidavit of Daniel Brown, marked Defendant's "Exhibit 1", introduced in evidence by the petitioner City of Hammond in opposition to the granting of the temporary injunction as prayed for in the bill of complaint. (Rec. 53 to 61).

(g) A map, marked "Exhibit A", in the affidavit of Daniel Brown, showing the City of Hammond, Indiana, and its relation to the City of Chicago, Illinois; the streets in the City of Hammond sought to be prohibited to respondent, etc. (Rec. 61 to 65).

(h) The affidavits of Henry Schappi and Henry Schappi, Jr., marked Plaintiff's "Exhibit 10" offered in evidence in rebuttal by respondent. (Rec. 65 to 74).

And this was all the evidence given in the cause. (Rec. 74 to 75).

(i) The respondent, in this Court, assigned as errors on appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the interlocutory decree of the United States District Court of Indiana, refusing to grant a preliminary injunction, that said District Court erred in refusing to grant said preliminary injunction and from enjoining said City of Hammond, its agents and servants from interfering with the respondent's busi-

ness in the carrying of passengers for hire as a common carrier of motor vehicles; (Rec. 79 to 80) that it was authorized to carry passengers as a common carrier on the public highways in the State of Indiana as a common carrier by reason of the certificates of public convenience and necessity issued to it by the Public Service Commission of Indiana; that the ordinance, under which the City of Hammond was undertaking to prosecute the respondent's employees was unlawful, as denying to the respondent equal protection of the laws, and depriving it of its property without due process of law; also, that the acts of the petitioner City violated Section 8 of Article I of the United States Constitution, giving to Congress exclusive jurisdiction over interstate commerce among the several states. (Rec. 80 to 81). That the action of the City of Hammond was unlawful in denying to the petitioner its natural rights in the carrying on of the business permitted to be carried on by others without discrimination; that the city Ordinance Number 1945 discriminated against the respondent and attempted to make it unlawful for the respondent to carry on its business, notwithstanding that the State of Indiana had authorized it so to do; that the ordinance was void for indefiniteness and uncertainty and for discrimination and in that it contravenes the commerce clause of the United States Constitution. (Rec. 81 to 83). That the Ordinance Number 1945 was void and unreasonable in that it gave to the Board of Public Works of said city an arbitrary power to deny to the respondent the right to carry on its business while authorizing others, similarly situated, to carry on a similar business; all of which grounds were definitely and specifically set forth is the assignment of errors made by respondent on said appeal as set forth in the printed record herein, pages 79 to 87 inclusive.

(j) The United States Circuit Court of Appeals for the Seventh Circuit, having jurisdiction of such appeal

from the United States District Court for the District of Indiana, fully heard said cause on appeal and said Court, after stating the principal facts and setting forth said Ordinance Number 1945 of the City of Hammond in full, held that:

> "There are several reasons why we are of the opinion that the bill should not have been dismissed, but we deem it necessary to consider but one." (Rec. 100 to 103).

The one reason considered and discussed in the opinion of the United States Circuit Court of Appeals was, that, said Ordinance Number 1945 unlawfully discriminated against the respondent; that said ordinance was claimed to be a police regulation and that it was not fair and reasonable for all persons alike; but, instead, that it was discriminatory and therefore unreasonable, illegal and void, and that the judgment of the United States District Court should be reversed, with directions to enter a decree granting the injunction prayed for by respondent. (Rec. 102 to 105).

(C) Omissions and Inaccuracies in Petitioner's Petition and Brief, Etc.

There are a great number of erroneous and incorrect statements in the petition and brief and argument filed by the City of Hammond in this court.

FIRST: At page four of the petitioner's brief a point is sought to be made against the opinion of the United States Circuit Court of Appeals in that it appears that a typographical error occurred in the opinion by which the opinion of the Circuit Court of Appeals states that the respondent, "appellant, incorporated under the laws of the State of Indiana," etc. (Rec. 101), instead of stating that respondent is incorporated under the laws of the State of Illinois. The opinion of the Circuit Court of Appeals, together with the entire printed record, shows this point to be without merit and that the word "Indi-

ana" is a mere misprint. It in no way affects the reasoning nor soundness of the opinion of the Circuit Court of Appeals.

SECOND: Also on page four of the petition of the City of Hammond at page two, an attempt is made by the petitioner to change the position taken in the Circuit Court of Appeals, and to claim that what was there argued to be a proper police regulation is here contended to be an exercise of the general police power, etc. This position of the petitioner is untenable and is an attempt to change positions in this Court from the position assumed in the United States Circuit Court of Appeals. (See: Opinion, Rec. 102 to 105).

THIRD: By the third point, pages four to five of the petitioner's petition and brief, an incorrect statement is made in Point 3-a, in this, that an attempt is made to say that Section 99 of Indiana Laws 1913, Chapter 76, page 201, provides that:

> *"No license, permit or franchise to own, operate, manage, or control, any plant or equipment of any public utility shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Indiana, or to a citizen of such state";*

but respondent submits that said section of Indiana Laws has no application whatever to the instant case for the reason, that it was not until the adoption of Chapter 46, Acts of 1925 Indiana General Assembly, pages 138 to 142 inclusive, that carriers of persons and property by motor vehicle for hire were regarded as public utilities, and by Section 1 of said Chapter 46, which is complete in itself, no limitation as to corporations organized under the laws of any state was made; also, that the previous law, relating to public utilities, being Chapter 76, Acts of 1913, supra, was only made applicable to motor vehicle carriers *"in so far as the terms and provisions of*

of said act may be reasonably applicable to such carriers", said Section 1 of said Chapter 64, Acts of 1925, supra, being as follows:

> "That *every corporation*, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, and every city or town that now or hereafter may own, operate, manage or control any motor vehicle, *except as hereinafter provided*, for the purpose of transporting passengers or property for compensation as a common carrier upon any of the public highways of the State of Indiana, is hereby declared to be a public utility within the meaning of the act of the General Assembly of the State of Indiana, entitled: 'An Act Concerning Public Utilities; Creating a Public Service Commission; Abolishing the Railroad Commission of Indiana and Conferring the Powers of the Railroad Commission on the Public Service Commission, Approved March 4, 1913'; and, except as herein provided, subject to all the terms and provisions of said act *"in so far as the terms and provisions of said act may be reasonably applicable to such carriers."*
>
> See: Chapter 46, Acts of Indiana General Assembly, 1925, pp. 138 to 142 inclusive.

Thus it will be seen that Chapter 46, Acts of Indiana General Assembly 1925, supra, made no limitation as to persons, corporations, companies, individuals, etc., who may act as carriers of persons and property by motor vehicle and no limitation is made in any law of Indiana in this regard. The erroneous statement and contention of the petitioner is, notwithstanding, repeated also at page 15 of the petitioner's petition and brief.

FOURTH: Also, at pages five to six of the petitioner's petition and brief, points 3-b and 4, and at many other places throughout the petitioner's petition and brief, it is sought to claim that the City of Hammond had granted a franchise to the Calumet Motor Coach Company for the transportation of persons and property by motor

vehicle for compensation, but it will be noted that no statute and no law, nor authority of any kind or character, is cited or referred to in any manner in the petition and brief of the petitioner, giving authority or purporting to give authority to the petitioner, City of Hammond, to grant any such purported franchise, and the respondent submits that *no such law exists in the State of Indiana, either statutory or otherwise.* It is a settled rule of law in Indiana that all doubtful claims to power are resolved against the city. (See: *Pittsburgh, etc., Ry. Co.* v. *Town of Crown Point,* 146 Ind. 421.)

See also: *Eichels* v. *Evansville Street Ry Co.,* 78 Ind. 261, at p. 263.
Logan v. *Pine,* 43 Iowa 524 (22 Amer. Reps. 261, at p. 263).
Elizabeth City v. *Banks,* 150 N. C. 407 (64 S. E. 189) (22 L. R. A. N. S. 925).
City of Dallas v. *Gill,* Texas Civil Appeals 1918 (199 S. W. 1144).

The authorities last above cited conclusively show that a municipal corporation cannot grant a franchise without express statutory authority, and respondent submits that in Indiana no such express statutory authority exists, and never has existed. Hence, the petitioner has inaccurately and erroneously attempted to contend for a position that is not within the facts and law applicable to the record.

But, even though a municipal corporation has power to grant a franchise, still, it does not, by granting a franchise, relinquish its police power over the same. Neither the state nor any municipality may alienate or relinquish its police power by granting a franchise or otherwise. To attempt to do so would be against public policy and void.

See: *City of New Albany* v. *New Albany Street R. R. Co.,* 172 Ind. 487 at p. 490.
Central Union Telephone Co. v. *Indianapolis Telephone Co.,* 189 Ind. 210 at p. 223.

And all police regulation must, in order to be valid, specify the rules and conditions to be observed, and be uniform and general in their applications, so that all persons alike may comply with the same, and such ordinances must not admit of an opportunity for the exercise of arbitrary discrimination by municipal authorities.

See: *City of Richmond* v. *Dudley*, 129 Ind. 112 at pp. 115 to 117.

FIFTH: An incorrect and misleading position is further assumed by the petitioner in Point 3-b, pages five to six of the petitioner's petition and brief filed in this court, in this, that as an attempted defense to the respondent's complaint for an injunction, the petitioner seeks to rely upon the proviso in Section 5 of Chapter 46, Acts of 1925 Indiana General Assembly, but respondent submits that this proviso does not in any sense grant, or attempt to grant, power to a municipality to grant a franchise. This proviso must be read in conjunction with Sections 1 and 2 of said Act set forth in Point THIRD supra, in that, the Legislature simply attempted by the proviso not to impair any possible contract that any city or town had made for operating, managing or controlling motor vehicles in the carrying of passengers for hire, which contract, if any, existed at the time the legislature passed said Chapter 46 of the Acts of 1925, providing for the regulation of motor vehicles engaged in carrying passengers for hire on the public highways of the State, and as the jurisdiction was given by the Legislature to the Public Service Commission of Indiana to give the Act a reasonable and valid interpretation, it must be held that any city or town operating, managing or controlling any motor vehicle carrying passengers for hire by motor vehicle under any "color of a contract" became, by virtue of said Chapter 46, in a sense at least, a public utility subject to the jurisdiction of the Public Service

Commission, and subject to all the provisions of said Chapter 46, supra.

See: Chapter 46 Indiana Laws 1925, pp. 138 to 140, Appendix A.

SIXTH: The petitioner has failed to make a concise statement of the facts in its petition and brief so far filed herein, clearly presenting the real questions for consideration. The "Statement of the Case" found in the petitioner's brief, pages 2 to 4, and also pages 14 to 17, is insufficient as it omits all of the important and essential facts shown by the bill of complaint, and which essential facts are of controlling importance in the determination of this case. All of these facts are set forth in the bill of complaint marked "Plaintiff's Exhibit 1"; and, to avoid repetition, reference is made to the printed record where the same is fully set forth, pages 2 to 27 inclusive.

There was little or no dispute in the facts as set forth in respondent's bill of complaint.

(D) The Questions Involved.

Under the facts, shown in evidence, the specific questions involved may be stated as follows:

1. Can petitioner, City of Hammond, lawfully interfere with, regulate, prevent, or prohibit respondent from carrying passengers for hire when engaged in interstate commerce, such as is shown by the facts?

2. Can the power and exclusive jurisdiction, vested in the Congress of the United States by Section 8 of Article I of the United States Constitution over commerce among the several states, be lawfully handicapped, burdened, regulated, or prevented, by petitioner, City of Hammond, by means of unfriendly ordinances, discriminations, or otherwise, such as is shown by the facts?

3. Can the City of Hammond, a municipal corporation, lawfully disregard, or collaterally attack, the Certificates of Public Convenience and Necessity issued to respondent by the Public Service Commission of Indiana, as shown by the facts?

4. Is not the jurisdiction over carriers of passengers by motor vehicles on the public highways in the State of Indiana given to the Public Service Commission of Indiana, by the provisions of Chapter 46, pages 138 to 142, inclusive, of the Acts of the General Assembly of the State of Indiana for the year 1925, superior to any purported authority, if any, which may have been delegated by the State of Indiana to the City of Hammond, as a municipal corporation in said State?

5. Is the said Ordinance No. 1945 of said City of Hammond, shown in the facts; and under which said petitioner City purports to act in burdening, preventing, and prohibiting respondent from carrying on its business in the carrying of passengers for hire, while engaged both in interstate commerce and intrastate commerce, unreasonable, illegal, and void, as being in conflict with the provisions of both the United States Constitution, Section 8, Article I, and the 14th Amendment thereto; and, also, in violation of Section 23, Article I, of the Indiana Constitution?

6. Is the said Ordinance No. 1945 of said City of Hammond, shown in the facts, and under which said petitioner City purports to act, unreasonable and invalid as vesting the Board of Public Works of said City with arbitrary power to determine who it will, or will not, permit to use the streets of said City in the carrying of passengers for hire, without furnishing any uniform rule of action governing such determination?

7. Is the said Ordinance No. 1945 of said City of Hammond, shown in the facts, and under which said petitioner

City purports to act, unreasonable and invalid as shown upon its face, in that: it discriminates against all carriers not having some contract or color of contract with said City?

8. Does it not appear on the face of said ordinance, shown in evidence, that its primary purpose is not regulation, with a view to safety or to conservation of the highways, but the prohibition of competition; for it determines, not the manner of use, but the persons by whom the highways may be used; it prohibits such use to some persons while permitting it to others for the same purpose and in the same manner; and it leaves the determination whether the prohibition shall be applied to the arbitrary discretion of the Board of Public Works of the City of Hammond, wherein the test and jurisdiction over interstate commerce, at least, is peculiarly within the Congress of the United States.

See: *Buck* v. *Kuykendahl*, United States Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 301 to 303.)

9. Can the City of Hammond lawfully prohibit the respondent from operating its motor buses in the carrying of passengers for hire, while engaged in interstate commerce, over the streets and public highways within said City of Hammond; and can petitioner, City of Hammond, also lawfully prohibit respondent, while so operating its motor buses, from stopping to permit passengers to alight from such buses upon the public highways in said City, and from stopping to pick up such passengers on the public streets of said City, so long as such stopping of respondents' motor buses is not for such a length of time as to be, or become, a public nuisance?

10. Respondent contends that a proper application of the law to the issues and facts in answer to the foregoing questions, and to other questions which may suggest

themselves upon the issues and facts shown in evidence, will show conclusively, that, the United States District Court for the District of Indiana erred in failing and refusing to grant a preliminary injunction in this cause, as prayed for by respondent; and that the opinion of the United States Circuit Court of Appeals, reversing the District Court, is correct.

(E) "Contested Issues."

There is little or no conflict in the facts shown in evidence in the instant case on any essential point.

The questions involved are, rather, questions of law, arising under the issues and the undisputed facts.

Respondent operates in Indiana under Certificates of Public Convenience and Necessity, issued to it by the Public Service Commission of the State of Indiana, over each of the routes and public highways specified in such Certificates. It has obtained, from the State of Indiana, all licenses and permits required by the laws of said state. It also has obtained licenses and permits as required by the State of Illinois, and is engaged in the carrying of passengers for hire between the two states. Its buses are registered in both states; its chauffeurs are licensed and competent, and in all other respects it has complied with the laws of such states regulating buses for hire; its buses are of an improved type, and it has developed a profitable business, with a substantial good will among the people who travel; its lines supply the principal means of transportation locally, between Calumet City, Illinois, and the cities of Hammond and East Chicago, Indiana, and the City of Chicago, Illinois. In the conduct of its business it carries on both interstate and intrastate business, principally interstate. The conduct of its business is a substantial convenience and advantage to the people served in both states.

But petitioner, City of Hammond, has undertaken to prevent and prohibit respondent from the further conduct of such business. The passage of Ordinance No. 1945 by said City of Hammond was for no other purpose than to be used in excluding respondent from carrying on the business of carrying passengers for hire over the public highways within said City, either as an interstate carrier or as an intrastate carrier.

By section 1 of said ordinance it is provided, that:

> *"It shall be unlawful for any person, firm, or corporation, owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon, or over, any of the following parts of streets within said City of Hammond."* (Naming certain streets.)

(See: Printed Record, p. 16.)

Reference to the map, marked Exhibit "A" in the affidavit of Daniel Brown (Printed Record, p. 65) will show that the streets, named in Section 1 of said ordinance, have the effect of excluding respondent from all the business section of said City, thus making it impossible to carry on respondent's business without violating the first section of said ordinance as the streets named prevent the entering or passing through the central or business portion of the City of Hammond, as required by the conduct of respondent's business in the carrying of passengers for hire.

This Section 1 of the ordinance also purports to exclude respondent from the very streets and public highways in said City of Hammond over which the Certificate of Public Convenience and Necessity, issued to respondent by the Public Service Commission of Indiana, authorized it to operate. Hence, there is a clear conflict of authority between the Public Service Commission of Indiana and the City of Hammond upon this point. (See:

Printed Record, pp. 5 to 27 and 35 to 50, Plaintiff's Exhibits "3," "4," "5," and "6.")

Section 2 of said ordinance makes it *unlawful for any operator to stop for the purpose of receiving or discharg passengers upon any street, alley, or other public place within said City.* (See: Printed Record, pp. 16 to 17.

This provision conclusively excludes respondent from the entire City of Hammond, whether it be in the conduct of interstate or intrastate business, unless, perchance, respondent may obtain a permit from the Board of Public Works of said City to so stop on certain named streets of said City for a period not exceeding six (6) months. No uniform rule, or rule of any kind, is provided as to the manner of determining whether such Board of Public Works shall issue or grant such a permit, and the question of whether it shall, or shall not, grant such a permit is left wholly to the uncontrolled, arbitrary discretion of such Board. (See: Printed Record pp. 51 to 52.)

Reference to the map, page 65 of the printed record, shows that this further exclusion, provided in Section 2 of the ordinance, has the effect simply to more completely and conclusively exclude respondent from approximately all of the City of Hammond; the region being bounded by Columbia Avenue on the east, State Line Street on the west, 122nd Street on the north, and all the principal cross streets within such City.

Still, again, by Section 2 of said ordinance, even *permission to operate, or to stop to take on or let off passengers in said City of Hammond, may only be granted by said Board of Public Works to persons engaged in interstate commerce, as to streets north of 122nd Street and east of Calumet Avenue.* (See: Printed Record, p. 52.)

Reference to the map, shown in the printed record, page 65, shows *that this provision of the ordinance ex-*

tirely prohibits respondent from carrying on its interstate business between the City of Hammond and the City of Chicago, as respondent would not be permitted, without violating the ordinance, to come south of the intersection of 122nd Street and Calumet Avenue, which means that respondent is entirely excluded and prohibited from carrying on its business, even though it be strictly interstate commerce,—Calumet Avenue being the only available route between Hammond and Chicago over which respondent may pass, and over which street, also, the Public Service Commission of Indiana has expressly granted respondent the right to carry on its business, after a full hearing, as shown by Plaintiff's Exhibit "4." (See: Printed Record, pp. 39 to 44.)

Again, the undisputed evidence shows, that, respondent has *asked permission of the Board of Public Works of said City of Hammond to drive its motor buses over said Hohman Street, enroute to Chicago, Illinois, and to stop thereon to let off and take on passengers, and that such permission has been arbitrarily refused by such Board.* (See: Printed Record, pp. 24 to 25.)

By Section 3 of said ordinance it is provided that a fine, not exceeding $50.00, shall be assessed for each and every offense arising under the provisions of said Sections 1 and 2 of said ordinance; and it is further provided, however, *in order to further discriminate against respondent and other carriers, similarly situated, that the ordinance shall not apply to a carrier having a contract, or color of contract, with said petitioners City, which Section 3 the Mayor and police officers of said City have construed to mean that it applies to respondent, and all carriers of passengers, except the Calumet Motor Coach Company.* (See: Printed Record, p. 52.)

Thus, it is conclusively shown that *the primary purpose of said ordinance is not regulation, with a view to safety*

or conservation of the highways, but the prohibition of competition; for said ordinance determines, not the manner of use, but the persons by whom the highways may be used; it prohibits such use to some persons, while permitting it to others for the same purpose, and in the same manner; and it leaves the determination whether the prohibition shall be applied to the arbitrary, uncontrolled discretion of the Board of Public Works of the City of Hammond.

Said ordinance is entire, and each part has a general influence over the rest; and, therefore, if one part of said ordinance is void, the entire ordinance is void, because all parts are so connected as to be essential to each other, and part of the ordinance, therefore, being void, the entire ordinance must be declared void, as respondent contends that it is. (See: *Buck* v. *Kuykendahl,* United States Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pages 301 to 303.)

"BRIEF OF ARGUMENT"

(A) The United States District Court, for the District of Indiana, Erred in Refusing to Grant a Preliminary Injunction, and the United States Circuit Court of Appeals for the Seventh Circuit Rightly Reversed the District Court.

I

The undisputed facts in evidence, on the hearing for a preliminary injunction, showed that respondent was engaged principally in carrying interstate passengers between the states of Illinois and Indiana by means of motor vehicles; and that petitioner, City of Hammond, was unlawfully burdening and interfering with respondent's said business, to the great damage of respondent.

The evidence further showed, that, respondent had complied with all the laws of the State of Indiana, and the State of Illinois, relating to such common carriers of passengers for hire; and that the Public Service Commission of Indiana had issued to respondent Certificates of Public Convenience and Necessity, specifically authorizing and empowering respondent to carry on such business within the State of Indiana and within said City of Hammond, over the streets and public highways in said State, as specified in such Certificates of Public Convenience and Necessity. Such a showing entitled respondent, as a matter of law and equity, to a preliminary injunction.

See: *Buck* v. *Kuykendahl*, United States Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 301 to 303.)

Bush & Sons Co. v. *Maloy,* United States Supreme Court, March 2, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 303 to 305.)

Michigan Public Utilities Commission v. *Duke,* United States Supreme Court, January 12, 1925. (Lawyers' Co-operative Publishing Co. Advance Opinions Nos. 6 and 7, pages 207 to 209.)

McNealy v. *Mayor and Board of Aldermen of the City of Natchez,* C. C. A., 5th Cir., March 31, 1925. (Federal Reporter, 2nd Series, Vol. 4, pages 899 to 900.)

Long, Mayor, et. al. v. *Miller,* U. S. C. C. A., 5th Cir., 262 Fed. 362.

Wabash, etc. Ry. Co. v. *Illinois,* 118 U. S. 557. (30 Law Ed. 244.)

Brimmer v. *Rebman,* 138 U. S. 78. (34 Law Ed. 862.)

Gloucester Ferry Co. v. *Commonwealth of Penna.,* 114 U. S. 196. (29 Law Ed. 158.)

Newport Electric Corporation v. *Oakley,* R. I. Supreme Court, June 24, 1925. (129 Alt. 613.)

II

Analysis of Provisions of Chapter 46, Acts of 1925, Indiana General Assembly.

The Indiana Legislature, at its 1925 Session, passed AN ACT entitled "An Act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana," and supplemental to an Act entitled, "An Act Concerning Public Utilities, creating a Public Service Commission, abolishing the Railway Commission of Indiana, and conferring the powers of the Railway Commission on the Public Service Commission, approved March 4, 1913, and declaring an emergency;" approved March 4, 1925, the same being Chapter 46, pages 138 to 142, of the Acts of the General Assembly for the State of Indiana for the year 1925.

By this Act, Section 1, it is provided, in substance, that:

(a) Every person or corporation, carrying passengers for hire upon the public highways of the State of Indiana, is declared to be a public utility, and placed within the jurisdiction of the Public Service Commission, and subject to the provisions of the Public Utilities' Law of said State, "insofar as the terms and provisions of said Act may be reasonably applicable to such carriers.

(b) By Section 2 of said Act provision is made for the issuing, by the Public Service Commission of Indiana, of Certificates of Public Convenience and Necessity to such carriers, authorizing them to carry on such business, and it is made unlawful to operate a motor vehicle in the carrying of passengers for hire, without having obtained such Certificate.

Section 2 of said Act further establishes the status of such certificates *as property* of such carrier, which may be sold, assigned, leased, bequeathed, or transferred, as other property, upon the approval of the Commission.

(c) By Section 3 of said Act provision is made that every carrier of passengers for hire shall furnish protection or indemnifying insurance, to be approved by the Public Service Commission, and that it shall be unlawful to operate a motor vehicle, in the carrying of passengers, without first having deposited such insurance policy with said Commission.

(d) By Section 9 of said Act it is provided, that:

> "All legal and equitable remedies of a civil nature to enforce the provisions of this Act, or of any lawful order, rule, or regulation made pursuant hereto, may be used by said Commission, or any person or corporation having a special interest in such enforcement."

(e) The entire Act, Chapter 46, Acts of 1925, is comprised of ten sections and, for convenience in reference, we have printed it in this brief as "Appendix A" in

full. It is under this enactment of the Legislature that each of the Certificates of Public Convenience and Necessity were issued to, and obtained by, respondent from the Public Service Commission of Indiana, as shown in evidence, authorizing respondent to carry on its business in the State of Indiana over the routes, shown in evidence, as a common carrier of passengers for hire, both as an intrastate and an interstate carrier.

(f) By Section 8 of said Act, it is provided, that:

> "Any person, firm, or corporation, which shall violate any of the provisions of this Act, or fail, or refuse to obey any lawful order of the Public Service Commission of Indiana made hereunder, shall, on conviction, be fined not less than $10.00, or more than $100.00, for each offense, and each day such violation shall continue shall constitute a separate offense."

(g) Respondent contends, therefore, that said Act, Chapter 46 of the Acts of 1925, thus placing motor vehicle carriers of persons for hire under the jurisdiction of the Public Service Commission, gave to such Commission full and exclusive jurisdiction over such carriers throughout the State of Indiana; and, also, gave the Commission jurisdiction to establish service over routes in the City of Hammond, or in cities and towns contiguous thereto, and other cities throughout the State of Indiana, except only where such service, if any, would compete with service on routes, which were established in whole or in part under contract at the time the said Act became effective, namely: April 28, 1925,—the date of the Governor's Proclamation.

Further, that, such power, if any, as the City of Hammond has, may be exercised only within its incorporated territory upon such carriers, who, at the time said Act became effective, operated under or by color of a contract with said City, and entirely within its incorporated territory.

And still further, that, all other carriers within such City are within the jurisdiction of the Public Service Commission only, and subject to the provisions of said law.

(h) In Section 5 of said Act provision is made that said Act shall not apply to taxicabs, hotel, funeral and school buses; and also the following provision is contained therein:

> "Provided further, that, in any city or town of this state where motor transportation is now furnished under or by color of a contract, and in cities and towns contiguous thereto, the Board of Public Works, Common Council, or Board of Trustees, as the case may be, shall continue to supervise, control, permit, contract for, and regulate *such service*, and to determine when, if at all, for public convenience and necessity, competing service shall be established; but the determination of the question of public convenience and necessity for competing service shall be subject to an appeal to, and review by, the Circuit or Superior Courts of the County upon complaint of any interested person, filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the Supreme Court."

As to said proviso in Section 5 of said Act, respondent says:

1. That said proviso is unconstitutional and void, as being in violation of Section 19 of Article IV of the Indiana Constitution, which requires that; "*Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.*" Said proviso is not indicated in any way by the title of said Act, nor is it connected with the subject matter expressed in the title of said Act.

See: Vol. 1 Burns' Indiana Statutes, Rev. of 1914, Section 115.
Mewherter v. *Price*, 11 Ind. 199 at p. 202.

Henderson v. *London & Lancashire Ins. Co.*, 135 Ind. 23 at pp. 24 to 31, incl.
Dickson v. *Poe*, 159 Ind. 492 at pp. 494 to 498.
Wabash R. R. Co. v. *Young*, 162 Ind. 102 at pp. 103 to 105.
State ex rel Western Construction Co. v. *Board of Commissioners*, 166 Ind. 162 at pp. 196 to 198.
State v. *Dorsey*, 167, Ind. 199 at p. 204.
Indianapolis Northern Traction Co. v. *Brennan*, 174 Ind. 1 at pp. 54 to 56.

2. Said proviso is also unconstitutional and void, as being in conflict with Sections 22 and 23 of Article IV of the Indiana Constitution, restricting the power of the Legislature of said State to pass local or special laws, because said proviso attempts to create an arbitrary classification of cities and towns, not bearing any reasonable or just relation to the subject matter of the Act, and in respect of which the classification is proposed.

See: Vol. 1 Burns' Indiana Statutes, Rev. of 1914, Sections 118 and 119.
School City of Rushville v. *Hayes*, 162 Ind. 193 at pp. 201 to 203.
Town of Longview v. *City of Crawfordsville*, 164 Ind. 117 at pp. 121 to 125.
Marion Trust Co. v. *Bennett*, 169 Ind. 346 at p. 350.
Board v. *Jackson*, 173 Ind. 76 at p. 87.
Bullock v. *Robinson*, 176 Ind. 198 at pp. 203 to 204.
Gulf, etc., Ry. Co. v. *Ellis*, 165 U. S. 150. (41 Law Ed. 666 at p. 668.)

3. Said proviso is also unconstitutional and void, as being in conflict with the 14th Amendment to the United States Constitution, in that: it denies to the inhabitants of the city of Hammond, and the patrons of respondent, and to respondent, the equal protection of the laws by such attempted arbitrary classification that is attempted to be made by said proviso.

See: *Gulf, etc., Ry. Co.* v. *Ellis*, 165 U. S. 150. (41 Law Ed. 666 at p. 668.)

4. Said proviso, if valid, is, by its express terms, restricted to "such service" of motor transportation as existed, or was being furnished under contract with said City, within said City of Hammond, at the time said Act took effect, and to such additional service as might compete therewith. All other carriers, not operating under contract with said City of Hammond within said City, were placed under the jurisdiction of the Public Service Commission.

See: Chapter 46, Acts of 1925, Indiana General Assembly, pages 138 to 142. Appendix A.

(i) Respondent contends, therefore, that, having obtained Certificates of Public Convenience and Necessity from the Public Service Commission, as shown in evidence and as provided for in said Chapter 46 of the Acts of 1925, Indiana General Assembly, that it had a legal right to operate its auto buses in the carrying of passengers for hire over the public highways and streets within the City of Hammond, without interference or molestation from said City, and that the United States District Court, for the District of Indiana, erred in refusing to grant a preliminary injunction, as prayed for, and that the opinion of the United States Circuit Court of Appeals is correct.

III

Analysis of Provisions of Chapter 213, Acts of 1925, Indiana General Assembly.

In addition to said Chapter 46, outlined in Point II, supra, the Indiana Legislature, at its 1925 Session, passed a further Act regarding "*automobile regulation*" entitled:

"An Act providing for the registration and licensing of motor vehicles, motor bicycles, tractors, trailers and semi-trailers, *for the regulation of the use and operation thereof on the public highways,* defining chauffeurs, and providing for the examination and licensing thereof, the suspension and revocation of licenses, and the transfer of ownership, requiring the keeping of certain records of motor vehicles, motor bicycles, and motor trucks for which storage, supplies, or repairs are furnished, providing that liens may be taken thereon, and prescribing penalties for the violation thereof." Approved March 14, 1925, the same being Chapter 213, pages 570 to 607, inclusive, of the Acts of the General Assembly of the State of Indiana for the year 1925.

(a) By Section 1 of said Act certain words and phrases, used in said Act, are specifically defined, such as: "motor vehicle," "motor trucks," "delivery cars," "local authorities," "public highways," and "auto bus."

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 570 to 571.

(b) By Section 9 of said Act the registration and license fee for all motor vehicles, *including "auto buses" engaged in both intrastate and interstate transportation of passengers on the public highways of the State,* are provided for.

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 575 to 578.

(c) By Section 14 of said Act the limitations for municipal licenses of motor trucks, delivery cars, and other passenger cars, are defined in any city or town in the State of Indiana; and providing that such license, issued by any city or town, shall be good in any other city or town within the State; and, that, only one such license shall be required.

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 579.

(d) By Section 33 of said Act provision is made for the kind and character of *lights required upon every motor bus, transporting passengers for hire.*

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 591 to 592.

(e) By Section 44 of said Act it is provided, that, no fees on motor vehicles shall be charged, except state fees, with the exception of motor trucks, motor driven commercial vehicles, and motor vehicles used in transporting passengers for hire.

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 597.

(f) By Section 45 of said Act it is provided, that, except as provided in said Act:

> *"No city, town, or other municipal corporation, shall have any power or authority to make any ordinance, by-laws, or resolution, limiting or restricting the use or speed of motor vehicles, or motor bicycles, and no ordinance, by-laws, or resolution, heretofore or hereafter made by any city, town, or other municipal corporation within this state, by whatever name known or designated, in respect to, or limiting the use of, motor vehicles or motor bicycles, shall have any force, effect, or validity, and all such ordinances, by-laws, and resolutions are hereby declared to be of no validity or effect."*

And, further, limiting and defining the power of such cities, towns, and other municipal corporations, as to motor trucks and motor driven commercial vehicles used within the limits of such municipal corporation for hire, and for the making and enforcing of reasonable traffic and other regulations.

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 597 to 598.

(g) By Sections 46 and 47 of said Act, local authorities are given a limited jurisdiction in public parks and cemeteries over motor vehicles used therein.

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 598.

(h) By Section 53 of said Act a limited authority is given to—

> "the proper authorities of cities and towns to designate certain streets or boulevards as preferential traffic streets and highways, and prescribe rules regulating traffic crossing over or turning into such streets or boulevards, and such authorities shall, likewise, have the power to regulate the traffic at such points or street intersections where traffic officers or automatic signals are stationed."

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 602.

(i) By Section 62 of said Act of all laws, and parts of laws, in conflict with said Act, Chapter 213, are repealed.

Section 63 of said Act contained an emergency clause whereby said Act took effect upon passage and approval by the Governor, and the same was approved March 14th, 1925.

See: Acts of 1925, Indiana General Assembly, Chapter 213, p. 607.

(j) Respondent contends, therefore, that by said Chapter 46 of the Acts of the General Assembly of Indiana for 1925, and by said Chapter 213 of the Acts of the General Assembly of Indiana for the year 1925, that *the Legislature expressly, and by implication, withdrew from all municipalities all power, authority, and jurisdiction which may, theretofore, have been delegated to such municipalities for the regulation and use, and operation, on the public highways of the state, of motor vehicles, except such power as is shown to have been expressly provided for in said Acts.*

Also, that the State, through said Chapter 46, giving jurisdiction to the Public Service Commission of Indiana, *delegated a power to a new agent to regulate carriers of persons by motor vehicles for hire on the public highways of the State of Indiana, which power, so given to the Public Service Commission of Indiana, is exclusive of all other agencies;* and, that, the City of Hammond, as a municipal corporation, had, and has, no power, or authority, or right, under the law, to interfere with or molest respondent in the conduct of its business in the carrying of passengers for hire over the public highways and streets within said City, respondent being authorized so to do by the Certificates of Public Convenience and Necessity issued to it by said Public Service Commission of Indiana.

See: Acts of 1925, Indiana General Assembly, Chapter 213, pp. 570 to 607, inclusive.

NOTE: For the convenience of the Court, respondent has printed in this brief, as "Appendix B," so much of said Chapter 213 of the Acts of the Indiana General Assembly for the year 1925, in full, as is deemed necessary to the decision of this case, being a part of Sections 1, 9, 14, 33, 44, 45, 46, 47, 53, 62, and 63.

IV

Statutes, Their Method of Construction, Etc.

"Statutes passed at the same session of the Legislature the same as statutes generally on the same subject, are to be construed together, if possible; but if they are irreconcilable the later supersedes the earlier."

See: *Shay* v. *City of Muncie*, 148 Ind. 14 at p. 21.
Wright v. *Board, etc.*, 82 Ind. 335.

"All statutes upon the same subject are to be construed together."

See: *Conn.* v. *Board*, 151 Ind. 517 at p. 526.

Therefore, respondent contends that, as Chapter 46 of the Acts of 1925, Indiana General Assembly, relates to the *regulation of motor vehicles* when used for carrying passengers for hire on the public highways of the State of Indiana; and that said Chapter 213 of the Acts of 1925, Indiana General Assembly, also relates to the licensing, *regulation, and use of motor vehicles, including therein auto buses and motor vehicles used in the carrying of passengers for hire on the public highways of the State of Indiana*—that said statutes should be construed together; and, when so construed, reasonably mean,

First: That by said Chapter 46 the State of Indiana designated *a new agent,* namely: the Public Service Commission, *to control the regulation of carriers of persons by motor vehicles for hire on the public highways of the State;* and,

Second: That the jurisdiction, given to the Public Service Commission of Indiana, *is exclusive of all other agencies,* and that the City of Hammond, as a municipal corporation, *has no power or authority, or right, under the law, to interfere with, or molest, respondent in the conduct of its business in the carrying of passengers for hire over the public highways and streets within said City, respondent being authorized so to do by the Certificates of Public Convenience and Necessity, issued to it by the Public Service Commission of Indiana.*

V

In view of the provisions made for the regulation of motor vehicles, when used for carrying passengers for hire on the public highways of the State of Indiana, by said Chapter 46 of the Acts of 1925, Indiana General Assembly, and by said Chapter 213 of the Acts of 1925, Indiana General Assembly, it is fair to assume that it was the intention of the Legislature to withdraw all power and authority, and jurisdiction, which may theretofore

have been granted to municipalities in the State of Indiana as to the regulation of such motor vehicles, except reasonable police regulations within the boundaries of such municipality with reference to traffic on its streets, and the use thereof by the public. This would mean such regulations as with reference to right or left turns, one-way streets, stops at certain points where safety and local conditions require it, and such other matters of purely local concern, which affect peculiarly the municipality. Such regulations as these should be reasonable in character, and not designed to nullify and set aside the orders of the Public Service Commission by materially interfering with the efficiency of the utility, as authorized by the Public Service Commission.

See: *City of Nelsonville* v. *Ramsey*, Ohio Sup. Ct., June 9, 1925, 148 N. E. 694 at p. 696, Col. 1.
Newport Electric Corp. v. *Oakley*, Rhode Island Sup. Ct., June 24, 1925, 129 Atl. 613.
Helmer v. *Superior Court of Sacramento County*, Calif. Sup. Ct., August 9, 1920, 191 Pac. 1001 at pp. 1001 to 1003.
Dent v. *Oregon City*, Oregon Sup. Ct., January 2, 1923, 211 Pac. 909.
Parker v. *City of Silverton*, Oregon Sup. Ct., November 13, 1923, 220 Pac. 139 (31 A. L. R. 589 at p. 593, Col. 2).
City of Tulsa v. *Thomas*, Okla. Sup. Ct., April 24, 1923, 214 Pac. 1070.
Ex parte Daniels, Calif. Sup. Ct., September 10, 1920, 192 Pac. 442 at pp. 444 to 445.

VI

The streets of a city belong to the people of the state as a whole, and every citizen of the state has a right to the use thereof, subject to legislative control. The right of control over street traffic is an exercise of a part of the sovereign power of the state. In some states this power, by the State Constitution, has been delegated to the

municipalities, but such *is not true in Indiana, where the right of control over street traffic, and upon the public highways of the State, is within the legislative control, solely.*

See: Vol. 3 Dillon on Municipal Corporations, 5th Ed., Par. 1122.
Farmers' & Merchants' Co-operative Telephone Co. v. *Boswell Telephone Co.*, 187 Ind. 371 at p. 376.
Grand Trunk Western Ry. Co. v. *City of South Bend*, 174 Ind. 203, at p. 209.

VII

In Indiana it is fundamental that the streets of a municipality are parts of the general highways of the state; and, as such, the State has primary control thereover when the interests of the public are concerned; and such power thereover, as municipalities may have when the interests of the general public are involved, are granted to the municipalities by the State, and may be withdrawn by the state. In effect, an agency for public welfare is thus established, and may be thus ended in the municipality.

By said Chapter 46 of the Acts of 1925, Indiana General Assembly, and by said Chapter 213 of the Acts of 1925, Indiana General Assembly, the State of Indiana withdrew from the municipalities of said State all such grants of power as such municipalities may have had theretofore, except in so far as said acts, expressly provided, might remain with such municipalities; and at the same time the State conferred upon a new agency, namely: the Public Service Commission of Indiana, the power of control over motor vehicle transportation for hire over the public highways of said State.

See: *Farmers', etc. Telephone Co.* v. *Boswell Telephone Co.*, 187 Ind. 371 at pp. 376 to 377.

See: Chapter 46, Acts of 1925, Indiana General Assembly, pp. 138 to 142.
Chapter 213, Acts of 1925, Indiana General Assembly, pp. 570 to 607.

(B) The United States District Court, for the District of Indiana, Erred in Refusing to Grant a Preliminary Injunction in This Cause, Enjoining the Petitioner City of Hammond from Enforcing Said Ordinance No. 1945 Shown in Evidence, and the United States Circuit Court of Appeals for the Seventh Circuit Rightly Reversed the District Court.

VIII

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is in excess of the city's power to adopt, and is an unwarranted interference with the rights granted respondent under the Certificates of Public Convenience and Necessity granted to it by the Public Service Commission of Indiana. Said ordinance is also unconstitutional and void.

See: Printed Record, pp. 51 to 52, Ordinance.
Printed Record, pp. 16 to 17, Ordinance.
Bouge v. *Bennett*, 156 Ind. 478 at pp. 480 to 486.
Cicero Lumber Co. v. *Cicero*, 176 Ill. 9 (68 Amer. State Reports 155 at pp. 163 to 165).

(a) It is settled law, that, a municipal corporation can pass no ordinance which conflicts with any general statute in force.

See: Vol. 1, Dillon on Municipal Corporations, 5th Ed., Par. 237.
Vol. 2, Dillon on Municipal Corporations, 5th Ed., Pars. 601 and 602.

(b) "All doubtful claims to power are resolved against the city."

See: *Pittsburgh, etc., Ry. Co.*, v. *Town of Crown Point*, 146 Ind. 421.

(c) By said Ordinance No. 1945 the City of Hammond has undertaken to strike down the state laws of providing for the regulation of motor vehicle transportation of passengers for hire, as provided in Chapter 46 of the Acts of 1925, Indiana General Assembly, and also Chapter 213, Acts of 1925, Indiana General Assembly; and the Mayor, Chief of Police, and other city officials of the City of Hammond, as shown by the evidence, refuse to recognize respondent's rights, granted to it in the Certificates of Public Convenience and Necessity, provided for by said Chapter 46 of the Acts of 1925, Indiana General Assembly, and have undertaken, in the enforcement of said ordinance, to assert, and they do assert, that the powers remaining in said City of Hammond, are superior to those conferred upon the Public Service Commission of Indiana by the Legislature. This presents a direct conflict between the legislative will and the acts of said City of Hammond, through its Common Council and other officers; and, when an ordinance, or the acts of the officials of a city conflict with the general laws of the State, the ordinance, and acts of such officials, are void because they conflict with the laws of the State.

See: Vol. 2, Dillon on Municipal Corporations, 5th Ed., Pars. 601 and 602.
Vol. 1, Dillon on Municipal Corporations, 5th Ed., Par. 237.

(d) The City of Hammond was, and is, without power to pass an ordinance, prohibiting and preventing respondent from operating its motor buses in the carrying of passengers for hire on the public highways of the State of Indiana, in conflict with the grants and Certificates of Public Convenience and Necessity issued to it by the Public Service Commission of Indiana. This question has been, a number of times, decided by the courts of other states.

See: *Parker* v. *City of Silverton*, Oregon Sup. Ct., November 13, 1923, 220 Pac. 139 (31 A. L. R. 589 at p. 593, Col. 2).

City of Tulsa v. *Thomas*, Okla. Sup. Ct., April 24, 1923, 214 Pac. 1070.

Ex parte Daniels, Calif. Sup. Ct., September 10, 1920, 192 Pac. 442 at pp. 444 to 445.

Dent v. *Oregon City*, Oregon Sup. Ct., January 2, 1923, 211 Pac. 909.

Helmer v. *Superior Court of Sacramento County*, Calif. Sup. Ct., August 9, 1920, 191 Pac. 1001 at pp. 1001 to 1003.

Newport Electric Corp. v. *Oakley*, R. I. Sup. Ct., June 24, 1925, 129 Atl. 613.

City of Nelsonville v. *Ramsey*, Ohio Sup. Ct., June 9, 1925, 148 N. E. 694 at p. 696, Col. 1.

IX

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, in that, it expressly undertakes to burden, restrict, and prevent interstate commerce, in violation of the Commerce Clause of the United States Constitution; in fact, it is shown by the evidence in this case that respondent's business is principally interstate commerce, in the carrying of passengers between the states of Illinois and Indiana, and that by Section 1 of said ordinance the City of Hammond has undertaken to prevent respondent from operating its motor vehicles over Hohman Street, State Street, Sibley Street, and Fayette Street, within the business section of said City of Hammond; thus rendering it impossible for respondent to carry on its business of interstate commerce in and from said City without violating Section 1 of said ordinance; while by Section 2 of said ordinance, it is provided, that, respondent may not stop its motor vehicles, for the purpose of receiving or discharging passengers, on any of the streets of said City, unless, perchance, it can obtain, from the Board of Public Works of said City, a limited permit for so doing; and said Section further provides, that:

"And for vehicles engaged strictly in interstate commerce any street or public place north of 122nd Street and East of Calumet Avenue,"

which latter provision excludes respondent entirely from said City, or from coming within approximately four (4) miles of the built-up and business portion of said City. Such an ordinance is unreasonable and void, and directly conflicts with the Commerce Clause of the United States Constitution.

See: *Buck* v. *Kuykendahl*, U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 301 to 303).
Bush & Sons Co. v. *Maloy*, U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 303 to 305).
McNealy v. *Mayor and Board of Aldermen of City of Natchez*, C. C. A., 5th Cir., March 31, 1925, Fed. Rep., 2nd Series, Vol. 4, pp. 899 to 900.
Long, Mayor, v. *Miller*, C. C. A., 5th Cir., 262 Fed. 362.
Newport Electric Corp. v. *Oakley*, R. I. Sup. Ct., June 24, 1925, 129 Atl. 613.

X

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, in that, it appears upon its face, that, *the primary purpose of said ordinance is not regulation, with a view to safety, or to conservation of the highways, but the prohibition of competition; it determines not the manner of use, but the persons by whom the highways may be used; it prohibits such use to some persons while permitting it to others for the same purpose, and in the same manner; and it leaves the determination of granting permission for such use to the uncontrolled, arbitrary discretion of the Board of Public Works of said City of Hammond.*

It is settled law, that, a state cannot forbid the use on its highways of motor vehicles, operated by common carriers for hire over regular routes in interstate commerce, merely because existing lines of transportation would be prejudiced thereby.

Therefore, respondent submits that, said Ordinance No. 1945 is unconstitutional and void, as being in direct conflict with the Commerce Clause of the United States Constitution; and also, violates the rights guaranteed to respondent by the 14th Amendment to the Federal Constitution.

See: *Buck* v. *Kuykendahl*, U. S. Sup. Ct., March 2, 1925, (Lawyers' Co-operative Publishing Co. Advance Opinions, No. 10, pp. 301 to 303).
Bush & Sons Co. v. *Maloy*, U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co. Advance Opinions No. 10, pp. 303 to 305).
Newport Electric Corp. v. *Oakley*, R. I. Sup. Ct., June 24, 1925, 129 Atl. 613.

XI

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, in that, by Section 2 of said ordinance it gives to the Board of Public Works of said City of Hammond *a naked arbitrary power to give, or withhold, the consent to stop and let off, or take on passengers on the streets and public highways in the City of Hammond, and makes respondent, and all others engaged in business of carrying passengers for hire by motor vehicles, even though engaged in interstate commerce, tenants at will as to their means of living under the said Board of Public Works, in violation of the 14th Amendment to the United States Constitution.*

See: *Yick Wo* v. *Hopkins*, 118 U. S. 356 to 374 (30 Law Ed. 220 to 228).

Cicero Lumber Co. v. *Cicero,* 176 Ill. 9 (68 Amer. State Reports 155, at pp. 163 to 165).
City of Tulsa v. *Thomas,* Okla. Sup. Ct., April 24, 1923, 214 Pac. 1070.
Bouge v. *Bennett,* 156 Ind. 478 at pp. 480 to 486.

XII

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, and is unreasonable, in that, by Section 2 thereof it gives an uncontrolled power to the Board of Public Works of said City of Hammond to grant, or withhold, the privilege, as it may suit the pleasure of said Board of Public Works, to respondent or others in like circumstances, and fails to lay down any uniform rule of action governing the exercise of such dispensing power. In Indiana such an ordinance is clearly unconstitutional and void.

See: *Bessonies* v. *City of Indianapolis,* 71 Ind. 189 at pp. 197 to 198.
Bills v. *City of Goshen,* 117 Ind. 221 at pp. 225 to 227.
City of Richmond v. *Dudley,* 129 Ind. 112.
City of Plymouth v. *Schultheis,* 135 Ind. 339.
State v. *Gerhardt,* 145 Ind. 439 at pp. 479 to 493.
City of Elkhart v. *Murray,* 165 Ind. 304.
Bouge v. *Bennett,* 156 Ind. 478 at pp. 480 to 486.

XIII

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, attempts to deprive respondent and others of a common right on the public highways. Travelers, whether on foot or in carriages, have a right to stop a reasonable time by the roadside for their convenience; *hacks and omnibuses may stop to load or unload passengers.*

To receive and discharge passengers upon the public streets of a city is an essential and necessary part of the transportation, by automobile buses, of passengers

from one place to another, and when this is being done in the usual and customary way, under a permit regularly issued by the Public Service Commission, it is not within the power of a municipality to prevent or prohibit it.

See: Vol. 2, Elliott on Roads & Streets, 3rd Ed., Par. 1100.
13 Ruling Case Law, Subject: "Highways," p. 220, Par. 186.
Birdsell Mfg. Co. v. *Loughman,* 26 Ind. App. 359 at p. 361.
Parker v. *City of Silverton,* Oregon, Sup Ct., November 13, 1923, 220 Pac. 139 (31 A. L. R. 589 at p. 593, Col. 2).

XIV

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void as a whole, each section thereof being dependent upon, and inter-related with, each and every section thereof. The ordinance, in its nature, is entire, and each part has a general influence over the rest. Therefore, the entire ordinance must be declared unconstitutional and void.

See: *Cicero Lumber Co.* v. *Cicero,* 176 Ill. 9 (68 Amer. State Reports 155, at pp. 163 to 165).

XV

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, is unconstitutional and void, in that, it unlawfully discriminates against respondent and others engaged in interstate commerce, in the carrying of passengers for hire. The Federal Constitution forbids the several states to discriminate in any way against the persons or property of other states, or against the use of products of other states, or against any one engaged in interstate business.

See: Vol. 7 CYC, p. 423, Subject: "Commerce."
Guy v. *Baltimore,* 100 U. S. 434 to 444 (25 Law. Ed. 743).

Grafty v. *City of Rushville,* 107 Ind. 502 at pp. 508 to 512.

Buck v. *Kuykendahl,* U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, pp. 301 to 303).

Bush & Sons Co. v. *Maloy,* U. S. Sup. Ct., March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, pp. 303 to 305).

XVI

A municipal ordinance of a regulatory nature, in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional, but it must be reasonable as well; that is, *the court, before which it is brought, must be able to see that it will tend to promote the public health, morals, safety, or welfare; that the means adopted are adapted to that end, and that it is impartial in operation, and not unduly oppressive upon individuals.*

See: 19 Ruling Case Law, pp. 805 to 806, Par 112.

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, tested by the foregoing principle, is unreasonable, unconstitutional, and void.

XVII

If an ordinance is passed by a municipal corporation which, upon its face, restricts the right of dominion, which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void because it fails to furnish a uniform rule of action, and leaves the right of property subject to the despotic will of the municipal officers, who may exercise it in accordance with some principle, which it would not be within the constitutional power of the state to sanction, or even

so as to give exclusive profits or privileges to particular persons.

See: Vol. 2, Dillon on Municipal Corporations, 5th Ed., Par. 598 at pp. 934 to 935.
19 Ruling Case Law, p. 813, Par. 118.
Yick Wo v. *Hopkins,* 118 U. S. 356 (30 Law Ed. 220 to 228).
Cicero Lumber Co. v. *Cicero,* 176 Ill. 9.
Bills v. *Goshen,* 117 Ind. 221.
Richmond v. *Dudley,* 129 Ind. 112.
City of Elkhart v. *Murray,* 165 Ind. 304.

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, tested by the foregoing principle and authorities, is unconstitutional and void.

XVII

A city ordinance, so framed as to burden, control, interfere with, or regulate, a common useful, private business or occupation, though enacted as a police regulation, will be held unconstitutional and void where there is an arbitrary, unreasonable, or unwarranted interference with the constitutional rights of the private citizen to pursue a lawful business or calling.

Said Ordinance No. 1945 of the City of Hammond, shown in evidence, tested by the foregoing principle, is unreasonable, unconstitutional and void.

See: *Harrigan and Reid Co.* v. *Burton,* Mich. Sup. Ct., October 1, 1923, 195 N. W. 60.

XIX

In so far as said Ordinance No. 1945 of the City of Hammond, shown in evidence, burdens, impedes, prevents, or prohibits the carrying on of interstate commerce in the carrying of passengers for hire between the states of Illinois and Indiana, the fact that Congress has not as yet adopted any Federal Regulation, to govern motor transportation is immaterial, and will not save said ordi-

nance from being held unreasonable, unconstitutional and void, as being in conflict with the Commerce Clause of the United States Constitution; for, as to such interstate commerce in the carrying of passengers, the jurisdiction of Congress to regulate is exclusive, and the fact that Congress has not so far acted, is evidence that it is the intention of Congress that such interstate traffic shall remain unfettered, undisturbed, and without any burden cast upon it.

See: *Wabash, etc., Ry. Co.* v. *Ill.*, 118 U. S. 557 (30 Law Ed. 244 at pp. 250 to 251).

Buck v. *Kuykendahl*, United States Supreme Court, March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, pp. 301 to 303).

Bush & Sons Co. v. *Molay*, United States Supreme Court, March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, pp. 303 to 305).

Newport Electric Corp. v. *Oakley*, R. I. Supreme Court, June 24, 1925 (129 Atl. 613).

City of Tulsa v. *Thomas*, Okla. Sup. Ct., April 24, 1923, 214 Pac. 1070.

McNealy v. *Mayor and Board of Aldermen of City of Natchez*, C. C. A., 5th Cir., March 31, 1925, Fed. Rep. 2nd Series, Vol 4, pp. 899 to 900.

XX

While it is well settled, that, if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections allowed to stand and be enforced; yet, where a portion of an act is valid and a portion invalid, and the court cannot say that the Legislature would have passed the act with the void portion eliminated, then the entire act must be held invalid.

Applying this principle to said Ordinance No. 1945 of the City of Hammond, shown in evidence, the entire

ordinance must fall, as being unreasonable, unconstitutional, and void.

See: *Springfield Gas., etc., Co.* v. *City of Springfield*, 292 Ill. 236 (126 N. E. 739 at pp. 742 to 743).
State ex rel Holt v. *Denny*, 118 Ind. 449 at pp. 475 to 480.
Spraigue v. *Thompson*, 118 U. S. 90 (30 Law Ed. 115 at p. 117, Col 1).

XXI

The passage of said Ordinance No. 1945 of the City of Hammond, shown in evidence, cannot be justified, and is not warranted under the proviso in Section 5 of said Chapter 46, Acts of 1925, Indiana General Assembly, which provides that:

> "In any city or town of this state where motor transportation is now furnished under or by color of a contract, and in cities and towns contiguous thereto, the Board of Public Works, Common Council, or Board of Trustees, as the case may be, shall continue to supervise, control, permit, contract for, and regulate such service, and to determine when, if at all, for public convenience and necessity competing service shall be established,"

for said proviso is unconstitutional and void, as heretofore pointed out in this brief.

The purported classification is arbitrary and fanciful, and based solely on whether a contract has, or has not, been made, or on the incident of contiguity. There is no lawful distinction between cities or towns, purporting to come within such proviso, and those outside of it, based upon any natural or reasonable difference in transportation problems which the Legislature sought to regulate.

See: *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30 Law Ed. 220 to 228).
Gulf-Colorado, etc., Ry. Co. v. *Ellis*, 165 U. S. 150 (41 Law Ed. 666 at p. 668).

XXII

Notwithstanding its lack of power, the City of Hammond, as shown by the evidence, adopted said Ordinance No. 1945 for the purpose of favoring the Calumet Motor Coach Company; and by said ordinance, the City has discriminated against, and has excluded, burdened, or restricted the operation of all other companies or persons engaged in carrying passengers for hire, both as to interstate and intrastate traffic, the City adopting, for its justification of such ordinance, the only distinction that the favored carrier has a contract, or color of contract, with the City. *The City had no power to make such a contract, or color of contract;* however, under the laws of Indiana, and the discrimination in the enforcement of said ordinance against respondent, and the failure to enforce the same against said Calumet Motor Coach Company, makes particularly applicable the following language of the Supreme Court of the United States in *Yick Wo* v. *Hopkins,* 118 U. S. 356:

> "In the present cases, we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons, as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, and to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in

appliance; yet, if it is applied and administered by public authority, with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

See: *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30 Law Ed. 220, at p. 227).

(C) The Points and Authorities and Argument of Petitioner Are Not Applicable to the Facts in the Instant Case and Each Authority Cited in Petitioner's Brief is Clearly Distinguishable Upon the Facts From the Facts in the Instant Case.

XXIII

An examination of the authorities cited in the petitioner's brief and petition herein show, that:

(a) None of the cases cited in petitioner's brief involve questions wherein Certificates of Public Convenience and Necessity had been issued to the bus company by the Public Service Commission of the State authorizing the bus company to operate in the carrying of passengers on the public highways of the state.

(b) None of the cases cited in petitioner's brief herein involve cases under statutes similar to the Indiana Statutes, Chapter 46, Acts of 1925, and Chapter 213, Acts of 1925, Indiana General Assembly.

(c) None of the cases cited in petitioner's brief herein involve ordinances similar to Ordinance Number 1945 of the City of Hammond.

(d) The excerpts from the authorities cited in petitioner's brief herein, when taken apart from the facts in the particular case from which the same are taken,

are misleading when attempt is made to apply them to the facts in the instant case.

(e) No case has been cited in petitioner's brief wherein any court of last resort has held that a municipality could, by ordinance, either directly or indirectly, nullify the Certificates of Public Convenience and Necessity issued by the Public Service Commission of the State, authorizing a bus company to transport passengers over the public highways.

But, see the following cases cited in respondent's brief herein:

Parker v. *City of Silverton,* Oregon Supreme Court, November, 1923 (220 Pac. 139), 31 A. L. R. 589 at p. 593, Col. 2.
City of Tulsa v. *Thomas,* Okla. Supreme Court, April, 1923 (214 Pac. 1070).
Newport Electric Corp. v. *Oakley,* R. I. Supreme Court, June 1925 (129 Atl. 613).
Ex Parte Daniels, Calif. Supreme Court, September, 1920 (192 Pac. 442 at pp. 44 to 445).
Dent v. *Oregon City,* Oregon Supreme Court, January 1923 (211 Pac. 909).
Helmer v. *Superior Court of Sacramento County,* Calif. Supreme Court, August, 1920 (191 Pac. 1001 at pp. 1001 to 1003).
City of Nelsonville v. *Ramsey,* Ohio Supreme Court, June, 1925 (148 N. E. 694 at p. 696, Col 1).

XXIV

Petitioner's contentions relating to a franchise carrier are beside the question, and not within the facts and law applicable to the instant case. No law exists in the State of Indiana, either statutory or otherwise, authorizing a municipal corporation to grant a franchise to transport passengers by motor vehicles for hire on the public highways of the State of Indiana.

Mere general statutory powers of a municipal corporation are not sufficient to authorize the granting of a franchise.

See: *Eichels* v. *Evansville Street Ry. Co.*, 78 Ind. 261, at p. 263.
Pittsburgh, etc., Ry. Co. v. *Town of Crown Point*, 146 Ind. 421.
Logan v. *Pine*, 43 Iowa 524 (22 Amer. Reps. 261, at p. 263).
Elizabeth City v. *Blanks*, 150 N. C. 407 (64 S. E. 189) (22 L. R. A. N. S. 925).
City of Dallas v. *Gill*, Texas Civil Appeals 1918 (199 S. W. 1144).

ARGUMENT

The record in the instant case presents for decision, in substance, the question whether or not rspondent, having obtained, from the Public Service Commission of Indiana, Certificates of Public Convenience and Necessity, specifically authorizing and empowering respondent to carry on such business within said State of Indiana, and within said City of Hammond, and over the streets and highways of said State as specified in such Certificates of Public Convenience and Necessity, can lawfully be prevented from carrying on such business by the petitioner, City of Hammond. The evidence shows, that, the principal part of respondent's business is interstate in the carrying of passengers between the states of Illinois and Indiana; but, that, it also does, and is authorized by such Certificates of Public Convenience and Necessity received from the Public Service Commission of Indiana, to do intrastate business over certain routes in the City of Hammond, and in the City of East Chicago, Indiana.

Respondent has complied with all the requirements and laws of the State of Indiana relative to such business; and, has likewise complied with all the laws and requirements of the State of Illinois; but the City of Hammond, a municipal corporation, has undertaken to prevent respondent from carrying on such business in and within said City, notwithstanding the authorization obtained by respondent from the Public Service Commission of Indiana.

In the recent case of *Buck* v. *Kuykendahl*, United States Supreme Court, March 2, 1925 (Lawyer's Co-operative Publishing Co., Advance Opinions No. 10, pp. 301 to 303), the Court held, that:

> "A state cannot prohibit the use on an interstate highway of auto vehicles by common carriers for hire over regular routes, without securing a certificate from a public official declaring that public convenience and necessity require such operation."

The difference is at once noticeable. The Supreme Court there held that even the Certificate of Public Convenience and Necessity was not necessary to the carrying on of interstate commerce; and that the state, even though such certificate had not been obtained, could not interfere.

In the instant case the state has granted to respondent the Certificates of Public Convenience and Necessity, by which respondent is authorized, by the State of Indiana, to do the very business which the City of Hammond attempts to prevent.

Also, in the recent case of *George W. Bush & Sons Co.* v. *William Maloy,* United States Supreme Court, March 2, 1925 (Lawyers' Co-operative Publishing Co., Advance Opinions No. 10, at pages 303 to 304), the Court held, that:

> "A state cannot forbid the use on its highways of motor vehicles, operated by common carriers for hire over regular routes in interstate commerce, merely because existing lines of transportation would be prejudiced thereby."

In deciding the case of *George M. Bush & Sons Co.* v. *William Maloy,* supra, at page 304, the Court, speaking by Justice Brandeis, said:

> "This case presents two features which were not present in *Buck* v. *Kuykendahl,* decided this day • • • the first is, that, the highways here in question were not constructed or improved with Federal aid. This difference does not prevent the application of the rule declared in the Buck case. The Federal aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, *but because those acts make*

clear the purpose of Congress that state highways shall be open to interstate commerce. The second feature is that here the permit was refused by the Commission; not in obedience to a mandatory provision of the state statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference, also, is not of legal significance in this connection. The state action in the Buck case was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred, arbitrarily or unreasonably, but because the statute, as construed and applied, invaded a field reserved, by the Commerce Clause, for Federal Regulation."

So it is in the case at bar. The City of Hammond has undertaken to invade a field reserved, by the Commerce Clause of the United States Constitution, for Federal Regulation, and has passed an ordinance, shown in evidence, by which it, as a municipal corporation, has undertaken to regulate interstate commerce between the states of Illinois and Indiana, and other states; and it is enforcing such ordinance through its police department, to the destruction of respondent's business. Yet, the United States District Court, for the District of Indiana, refused to protect respondent, by denying to respondent the preliminary injunction as prayed for.

The State of Indiana, through the Public Service Commission, granted to respondent Certificates of Public Convenience and Necessity, covering all the routes over which respondent operates its motor vehicles within said state, whether the same be used in intrastate or interstate business. This action of the Public Service Commission of Indiana is in accordance with the very recent decision of the Supreme Court of Rhode Island in the case of *Newport Electric Corporation* v. *Oakley*, decided June 24, 1925 (129 Atl. 613), wherein the Supreme Court of said state held, that, it was proper for the state to

grant such certificates covering both interstate and intrastate traffic. The Court, on this point, at page 614, said:

> "The certificate cannot be withheld from a person about to engage in interstate commerce on the ground that the public is being adequately served over the proposed route, or that public convenience and necessity do not require the contemplated service. A state can not regulate competition in interstate commerce. Since this cause was commenced in the Federal Supreme Court, in an opinion rendered March 2, 1925, *Buck* v. *Kuykendahl*, 45 Sup. Ct. 324, held that, a statute, which prohibits common carriers for hire from using the highways by auto vehicles between fixed termini, or over regular routes, without first having obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation, violates the Commerce Clause when applied to persons engaged in interstate commerce, and we agree with the respondent in his contention that to withhold from a person, about to engage in interstate commerce, a certificate on the ground that he is not a citizen resident within this state, is forbidden by the Commerce Clause. A state statute affecting interstate commerce, which discriminates in favor of citizens of other states, is void as an interference with, and placing a burden upon interstate commerce amounting to regulation."

And the Supreme Court of Rhode Island, at page 614, further said:

> "It is unimportant that Congress has failed to act. As the subject admits of, and requires, uniform regulation, it is exclusively within the National domain, and non-action by Congress indicates its will that such commerce shall be free and untrammeled. (Citing many cases.)"

Applying the foregoing principles to the instant case respondent contends, that, the entire action of petitioner, City of Hammond, including the passage of the ordinance shown in evidence, is unlawful and in direct conflict with

respondent's rights, guaranteed by the Constitution of the United States; and, further, that its acts are in direct conflict with the Commerce Clause of the United States Constitution.

The action of petitioner, City of Hammond, thus being clearly unlawful and in violation of the Constitutional provisions, respondent was entitled to a preliminary injunction.

By Chapter 46, pages 138 to 142 of the Acts of the General Assembly for the State of Indiana, for the year 1925, the State placed the jurisdiction over common carriers, engaged in carrying passengers for hire on the public highways of the State, in the Public Service Commission of Indiana.

In the "Brief of Argument" we have outlined the several provisions of this Act, and in "Appendix A" to this brief, we have copied the Act in full. In substance, it may be said that, this Act gives jurisdiction to the Public Service Commission of Indiana to control carriers of passengers for hire upon the public highways of the state, by means of certificates to be issued, authorizing such traffic, and requiring insurance to compensate for damages to any one injured, either in person or property, by reason of such operation, and by other provisions contained in said Act.

From an examination of the entire act it is evident that it was the intention of the Legislature to place the entire subject of such carriers under the jurisdiction of the Public Service Commission, for, the title of the act is as follows:

> "AN ACT to Regulate Certain Carriers of Persons and Property by Motor Vehicle for Compensation on the Public Highways of the State of Indiana, etc."

In Section 5 of said act, however, the following proviso is inserted:

> "Provided further, that in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the Board of Public Works, Common Council, or Board of Trustees, as the case may be, shall continue to supervise, control, permit, contract for, and regulate *such service;* and to determine when, if at all, for public convenience and necessity, competing service shall be established; but the determination of the question of public convenience and necessity for competing service shall be subject to an appeal to, and review by, the Circuit or Superior Courts of the County upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the Supreme Court."

Respondent contends, that, this proviso is unconstitutional and void—

First: Because from the title of the act no such proviso is indicated, nor included in the subject contained in the title.

Second: Because it is an attempt to pass a local or special law, creating an arbitrary classification of cities and towns, without any reasonable or just relation to the subject matter of the act for such classification.

Third: That it denies to the inhabitants of the City of Hammond, the patrons of respondent, and to respondent, the equal protection of the laws afforded by the act, giving jurisdiction to the Public Service Commission of Indiana; and,

Fourth: That said proviso attempts to give to the City of Hammond, and such cities or towns that might claim to fall within the proviso, privileges or immunities which are not granted to other citizens, and cities

and towns, of the State of Indiana, upon the same terms, in violation of Section 23, Article I, of the Indiana Constitution.

Respondent contends, that, each and all of these objections to said proviso are well taken.

Section 19 of Article IV of the Indiana Constitution requires that:

> "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title."
>
> See: Vol. 1 Burns' Indiana Statutes, Rev. of 1914, Sec. 115.

Sections 22 and 23 of Article IV of the Indiana Constitution, being Sections 118 and 119 of Volume 1, Burns', supra, forbids the passage of local laws, and requires that all laws shall be general and of uniform operation throughout the State.

In the "Brief of Argument" we have cited numerous Indiana decisions, construing these several sections of the Indiana Constitution, which counsel for respondent contends sustain respondent's view, and show conclusively that said proviso is unconstitutional and void. To these authorities we most respectfully refer the Court.

The classification of cities or towns, made in this proviso, is in fact no classification. It is arbitrary and fanciful, without any real basis or foundation therefor. It may be said to be based solely on whether a contract, or color of contract, has been made, or on the mere incident of contiguity. There is no distinction between cities coming under such proviso and those outside of the same, based upon any natural or reasonable difference in transportation problems, which the law seeks to regulate.

In the case of *Gulf-Colorado, etc. Ry. Co.* v. *Ellis*, 165 U. S. 150 (41 Law Ed. 666) considering the question of classification, the Court held:

"Classification to relieve a law from the charge of a denial of equal protection cannot be made arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted classification."

Tested by this principle the proviso must fall.

In *School City of Rushville* v. *Hayes*, 162 Ind. 193, in considering the question of classification, required by Section 23 of Article IV of the Indiana Constitution, at pages 201 to 202, the Court said:

"Inferior in dignity and force of obligation only to the Constitution of the United States and the Acts of Congress, and treaties made under it, the State Constitution is the supreme law of the Commonwealth. It is to be interpreted and applied in a reasonable manner. It is to be observed and obeyed and not evaded and defeated by distinctions and classifications which rest upon no rational or natural basis, and which deceive no one. When it declares that the General Assembly shall not pass local or special laws, providing for supporting common schools, and for the preservation of school funds, its mandate cannot be defeated by creating a class of cities differing in no material respect from scores of others in the state. The mere convenience of local communities, the financial necessities of particular cities, the conflicting views of citizens on the subject of necessity for the erection of school buildings, are not sufficient to authorize legislation which the Constitution prohibits. Attempted evasions of the Constitution, the object of which is to meet and overcome such local and special conditions, cannot be tolerated. A due regard for the highest interests of the citizens of the state requires that all constitutional limitations and restrictions shall be firmly and constantly enforced.

"In *Gulf-Colorado, etc. Ry. Co* v. *Ellis*, 165 U. S. 150, 159; 17 Sup. Ct. 255 (41 Law Ed. 666) the Court said:

'But arbitrary selection can never be justified by calling it classification. The equal protection,

demanded by the Fourteenth Amendment, forbids this.'

"In *State* v. *Ellis*, 115 Mo. 307, 314; 22 S. W. 350 (21 L. R. A. 789) quoted with approbation in *Gulf, etc. Ry. Co.* v. *Ellis*, supra, it was said by Black, J.:

"'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences, which would serve for a classification for some purposes, furnish no reason whatever for a classification for legislative purposes. The difference, which will support class legislation, must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land.'"

So it is in the instant case, as respondent contends. The mere fact, if it be a fact, that some small town or municipality has entered into a contract, or color of a contract, for motor transportation, ought not to be sufficient to justify a classification exempting such town or municipality from the operations of a general law, intended to regulate the carrying of passengers for hire over each and all of the public highways of the state.

Counsel for respondent press the consideration of the unconstitutionality of this proviso in Section 5 of the act upon the Court's attention for the reason, that, it may be argued by appellee that, under this proviso in Section 5, the acts of the City of Hammond, in attempting to oppress respondent, may be justified, and that such proviso should be so construed, as to authorize the passage of the ordinance under which petitioner City purports to act in its oppression of respondent; but, respondent contends, that, such a position is, and must be, held to be untenable; because the very proviso itself

is in conflict with both the State and Federal Constitution, as herein pointed out; and, further, that the ordinance is unconstitutional and void and in no way authorized by the proviso, even though the proviso, in and of itself, should be held valid.

In *Town of Longview* v. *City of Crawfordsville,* 164 Ind. 117, the question of classification of cities was before the Indiana Supreme Court, wherein an act, providing that cities having a population between six and seven thousand, and not operating under a special charter, may annex territory, including towns within such territory, and consolidate such towns with such cities, but the Supreme Court of Indiana held that such an act, or attempted classification, was arbitrary and special; and further held, that:

> "Where classification of cities, for the purpose of enacting laws to govern same, is permitted by the Constitution, such classification must be one which, in the nature of things, suggests and furnishes reasons therefor, and justifies the making thereof. Such classification must not be unnatural, artificial, arbitrary, or founded upon isolation alone."

Under the proviso in Section 5, although the cities are identical in size and traffic problems, this proviso attempts, by an arbitrary and fanciful method of classification, to exempt certain cities and towns from the operation of the general law. Such a proviso affords no ground for a classification; and, in fact, the proviso might also be said to be void for uncertainty; for, what, in fact, is to be understood from that portion of the proviso which says that:

> "In any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and town contiguous thereto."

Can the Court say that such language means carriers of persons and property by motor vehicles for compensa-

tion on the public highways of the State of Indiana, as specified in the title to said act?

Is it intended, by this portion of the proviso, to give to some cities and towns extraterritorial jurisdiction as to contiguous towns and cities?

Does "motor transportation" necessarily mean the carrying of persons and property by motor vehicle for compensation on public highways of the State of Indiana?

It seems to us that the proviso, in and of itself, is so uncertain as to be void for uncertainty, when found as a part of an act that purports to give jurisdiction to the Public Service Commission of Indiana, to regulate the carrying of passengers and property by motor vehicles for compensation on all the public highways of the state. Such proviso, if given effect, is in conflict with the evident purpose of the Legislature, as disclosed by the entire act.

What is intended in the proviso by the phrase, "under, or by color of, a contract"? May it be said that mere verbal permission from the public authorities in some town or city gave color of a contract to operate as a common carrier of passengers on the public highways of the state, outside of the jurisdiction intended to be given to the Public Service Commission?

Is there such a thing in law as "under or by color of a contract"? We have "express contracts"; we have "implied contracts," but do we have "color of a contract," that has any real legal meaning?

"Color" in a pleading is said to mean an apparent, but legally insufficient ground of action. "Color of office" is said to be a pretense of official right. Can it be said that upon a mere pretense of "color of contract," so-called, that a city or town may claim to be without the jurisdiction of the Public Service Commission in a mat-

ter so important as the regulation of the carriers of passengers as common carriers on the public highways of the state?

The Indiana Legislature, at its 1925 Session, evidently intended to cover the entire subject of regulation of automobile traffic; for, in addition to said Chapter 46 of the Acts of 1925, the Legislature also passed an Act comprised of sixty-three sections, and repealing all laws in conflict therewith, by which provision is made for the regulation of the use and operation of automobiles upon the public highways. This act makes numerous provisions regarding motor vehicles used in the carrying of passengers for hire defining them as "auto buses," making provision for the licensing and control of motor vehicles, engaged in both intrastate and interstate transportation of passengers; and, by Section 45 of said Act expressly withdrew from all cities, towns, and municipalities of the State, all power and authority regarding the use of motor vehicles upon the public highways, except such as said Act permitted such towns and cities, or municipalities to retain.

In the "Brief of Argument" we have analyzed the provisions of said Chapter 213 of the Acts of 1925, and in "Appendix B" set forth all the provisions of said Act, which we deemed necessary to a decision of this case. The important point being, however, that it is evident from a consideration of Chapter 46, and Chapter 213, of the Acts of 1925, that it was the evident intention of the Legislature of Indiana to completely cover and provide for automobile regulation, and as to auto buses or motor vehicles, used in the carrying of passengers on the public highways for compensation, it gave the Public Service Commission of Indiana jurisdiction exclusively to license and control the same.

It is a settled principle of statutory construction that all statutes upon the same subject are to be construed

together. Therefore, it is right and proper that the Court should consider both of these enactments in determining the purpose of the Legislature regarding automobile regulation within the State.

In *Dent* v. *Oregon City*, Supreme Court of Oregon, January 2, 1923 (211 Pac. 999), it was held that the act of the Legislature of that state, giving the Public Service Commission power to regulate transportation companies on public highways, repealed all charter powers theretofore granted to municipalities in said state in conflict with said act. Such must have been the evident intention of the Indiana Legislature in passing Chapter 46 and Chapter 213 of the Acts of 1925.

See also: *City of Nelsonville* v. *Ramsey*, Ohio Supreme Court, June 9, 1925 (148 N. E. 694 at p. 696 Col. 1).

In Indiana the streets of a city belong to the people of the state as a whole, and the right of control over street traffic is in the state, not the municipality. In some states it is true this power, by the State Constitution, has been delegate to the municipalities, but such is not true in Indiana, where the right of control over street traffic and upon the public highways of the state is within the legislative control, solely. This control may be withdrawn, if delegated to one agency, and bestowed upon a new agency at any time by the State Legislature, either with or without the consent of any such municipality.

See: *Farmers' & Merchants' Co-operative Telephone Co.* v. *Boswell Telephone Co.*, 187 Ind. 371, at p. 376.
Grand Trunk Western Ry. Co. v. *City of South Bend*, 174 Ind. 203 at p. 209.

By Chapter 46 of the Acts of 1925, Indiana General Assembly, the Legislature withdrew from the municipalities of the State all control over common carriers of passengers for hire by motor vehicles, and gave the juris-

diction over same to the Public Service Commission of Indiana. This is clearly the purpose of the act, with the evident intent of giving a uniform regulation throughout the state, and avoid and prevent conflict between the operators of auto bus transportation, if the control of the same had been left with the many cities, towns, and municipalities within the State.

The Ordinance No. 1945 of the City of Hammond, shown in evidence, and under which ordinance said City purports to act in interfering with respondent, was passed by the Common Council of the City of Hammond, and became effective, May 23, 1925, after both Chapter 46 and Chapter 213 of the Acts of 1925, Indiana General Assembly, were in force. Therefore, if said ordinance conflicts with the provisions of said enactments of the State Legislature, as respondent contends that said ordinance does, then it is void, as being in conflict with the statute of the State; for, it is settled law that a municipal corporation can pass no ordinance which conflicts with any general statute in force.

It is also settled law, that:

> "All doubtful claims to power are resolved against the city."

In the instant case we have the agent, the City of Hammond, claiming to have power greater than its principal, the State; claiming, also, that the State cannot withdraw any supposed delegated authority, which had once theretofore been delegated to the agent by the State. Such claims are in direct conflict with the law of the State, as declared by the Supreme Court of Indiana many times.

See: *Farmers' & Merchants' Co-Operative Telephone Co.* v. *Boswell Telephone Co.*, 187 Ind. 371, at p. 376.
Grand Trunk Western Ry. Co. v. *City of South Bend*, 174 Ind. 203 at p. 209.

By said Ordinance No. 1945 petitioner, City of Hammond, has undertaken to strike down the state laws providing for the regulation of motor transportation of passengers for hire, as provided in said Chapter 46, and to assume unto itself an authority greater than the State has granted to the Public Service Commission of Indiana. This presents a direct conflict between the State of Indiana, as represented by the Public Service Commission, and the City of Hammond, as a municipal corporation within said State.

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others:

First: Those granted in express words.

Second: Those necessarily or fairly implied in or incident to the powers expressly granted.

Third: Those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. They can exercise no powers but those which are conferred upon them by the act, by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from nature of corporations, the mode in which they are organized, and in which their affairs must be conducted.

See: Vol. 1, Dillon on Municipal Corporations, 5th Ed., Sections 237 to 238.

Therefore, respondent submits that the City of Hammand was, and is, without power to pass an ordinance such as said Ordinance No. 1945, for there is no statutory authority under which the City of Hammond may act, and its passage is not necessary to the carrying out of its corporate purposes and existence.

The City of Hammond has no implied powers except as to its corporate existence, and it must be remembered that the City of Hammond in the instant case is not only in conflict with respondent, but is in direct conflict with the State itself, through the State's duly authorized agent, and to whom jurisdiction has been given to regulate transportation by motor vehicles on the public highways of the State.

In *Parker* v. *City of Silverton*, Oregon Supreme Court, November 13, 1923, 220 Pac. 139 (31 A. L. R. 589 at p. 593, Col. 2), the Court, having a similar question before it, said:

> "In order for plaintiff to transport passengers for hire between Salem and Silverton, as authorized by the Public Service Commission, it is necessary for him to receive and discharge his passengers upon the public streets of Silverton. He is authorized to transport them to and from Silverton, and he cannot be compelled to receive and discharge them outside of the corporate limits of that city. *To receive and discharge passengers upon the public streets of a city is an essential and necessary part of the transportation by automobile buses of passengers from one place to another, and when this is being done in the usual and customary way, under a permit regularly issued by the Public Service Commission, it is not within the power of a municipality to prevent or prohibit it.* This provision of the ordinance, as well as some of the others hereinabove alluded to, is in direct violation of the provisions of the statute, and is therefore illegal and void."

In *City of Tulsa* v. *Thomas*, Oklahoma Supreme Court, April 24, 1923 (214 Pac. 1070), the Supreme Court of that State had before it a similar question as to an ordinance of the City of Tulsa, and among other things, the Court, at page 1071, said:

> "In the second place, the Court did not consider the application of the 1919 statute which, in terms, we believe, *creates an absolute vested right to the*

use of public streets of any municipality for the purpose of conducting the business of carrying passengers for hire, subject only to the right to reasonable regulation. Prior to the passage of the 1919 statute it might be held that, under the weight of decisions cited, that no vested right to use the streets for such purposes did exist, but we believe that the passage of the statute was sufficient to change materially the status of the situation. In view of the exercise of the Supreme Legislative body of this State in giving a statutory right to conduct the jitney business on the public highways, we believe that the municipal legislative bodies are limited to the provisions of that act, and could only be permitted to exercise reasonable regulation and control for the preservation of public safety, as authorized by the statute.

"From the provisions of the ordinance, as hereinabove presented, we reach the conclusion that the City Commission of the City of Tulsa exceeded its authority as granted to it by the Legislature.

"The case of *Yick Wo* v. *Hopkins,* 118 U. S. 356 (30 Law Ed. 220), involving the passage of a city ordinance in the City of San Francisco, limiting and regulating the conduct of the laundry business is singularly pertinent to the case at bar."

NOTE: (The Supreme Court of Oklahoma then proceeds to quote at length from the case of *Yick Wo* v. *Hopkins,* supra, basing its decision upon the holding of the Supreme Court of the United States in said case, all of which is equally applicable to the instant case. See *City of Tulsa* v. *Thomas,* supra, at pages 1071 and 1073.)

Applying the reasoning of the Supreme Court of Oklahoma in the City of Tulsa case, supra, we wish to call the Court's attention to Section 2 of Chapter 46 of the Acts of 1925, Indiana General Assembly, in question. It will be noted that, by said Section 2, the Certificates of Public Convenience and Necessity, authorized by the Legislature, *are recognized as property,* that portion of said Section 2 being as follows:

"That the owner of any motor vehicle common carrier service which has been lawfully operated over a fixed route with a substantially regular schedule, upon the highways of the State for a period of ninety days immediately prior to the taking effect of this act, and is engaged in such operation at the time of filing application therefor, *shall receive from the Public Service Commission a certificate of convenience and necessity to continue such operation, upon submitting to the Public Service Commission within thirty days from the taking effect of this act, verified proof in writing of such continued service and complying with the provisions of Section 3 of this act, and any certificate owned, held, or obtained by any such carrier may be sold, assigned, leased, bequeathed, or transferred as other property upon approval by the Commission.*"

Three of the Certificates of Public Convenience and Necessity, received by respondent from the Public Service Commission of Indiana, were issued to it under the express provisions of Section 2 of said statute, as a ninety-day operator; in fact, respondent was a carrier of passengers for hire for years before the passage of said act, but was only required to show a continued operation for ninety days prior to the taking effect of the act in order to come within its provisions. This it did, and received from the Public Service Commission of Indiana, under the express provisions of Section 2 of said act, Certificate 324-M (Printed Record, pp. 35 to 38); Certificate 326-M (Printed Record, pp. 45 to 48); and Certificate 327-M (Printed Record, pp. 48 to 50). It also, upon a public hearing, in accordance with the provisions of Section 2 of said act, received its fourth and further Certificate Number 325-M (Printed Record, pp. 39 to 44).

But, notwithstanding the aforesaid facts, the City of Hammond has undertaken to strike down respondent's rights thus granted to it by the Public Service Commission of Indiana, and to prevent respondent from operating under said Certificates, and is so doing, by means

of the police force of such city. Respondent was, therefore, without other remedy at law, or in equity, than to pray for an injunction to protect its rights and property; but the United States District Court, for the District of Indiana, denied such preliminary injunction, and in which respect respondent most respectfully submits, said Court erred.

That said Ordinance No. 1945 of the City of Hammond is unconstitutional and void, in so far as it attempts to interfere with respondent in the carrying on of interstate commerce, seems to be too clear to require extended argument. The case of *Buck* v. *Kuykendahl,* supra; *Bush & Sons* v. *Maloy,* supra, and other cases cited in the "Brief of Argument," most certainly settled this question in appellant's favor.

Again, the ordinance, if enforced, deprives respondent of its property without due process of law, and denies to respondent the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution; for respondent's Certificates of Public Convenience and Necessity, granted to it by the Public Service Commission, are expressly declared to be property, which may be transferred and sold as other property by Section 2 of said Chapter 46, Acts of 1925, Indiana General Assembly.

The Supreme Court of Oklahoma, in *City of Tulsa* v. *Thomas,* supra, at page 1073, quoting from the case of *Yick Wo* v. *Hopkins,* supra, said:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford to unequal and unjust discrimination in their administration, for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require

the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself with a mind so unequal and oppressive as *to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, and to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States.*"

In the instant case the ordinance, by its express provisions in Section 3, shows that it was intended, not to be operative generally; and the facts, shown in evidence, conclusively show that the ordinance was passed at the request of the Calumet Motor Coach Company; and, that, it is being enforced solely for the benefit of that company in an effort to prevent competition, and for no other purpose whatsoever.

Moreover, it appears, from an examination of the ordinance, and especially in view of the facts shown in evidence, that the primary purpose of the ordinance is not regulation, with a view to safety, or to conservation of the highways, but the prohibition of competition; for, it determines, not the manner of use, but the persons by whom the highways and streets may be used; it prohibits such use to the uncontrolled, arbitrary discretion of the for the same purpose and in the same manner; and it leaves the determination of granting the permission for such use to the uncontrolled, arbitrary discretion of the Board of Public Works of the City of Hammond. Such ordinance, or such a law, had it been passed by the State Legislature of Indiana, was expressly condemned by the Supreme Court of the United States in *Buck* v. *Kuykendahl*, supra, where, at page 303, Justice Brandeis, speaking for the Court in construing the statute involved in that state, said:

"Its primary purpose is not regulation, with a view to safety, or to conservation of the highways,

but the prohibition of competition; it determines, not the manner of use, but the persons by whom the highways may be used; it prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort through state officials to a test, which is peculiarly within the province of Federal action."

Also, the Supreme Court of the United States, in *George W. Bush & Sons Co.* v. *William M. Molay,* supra, speaking by Justice Brandeis, at page 304, said:

"The State action in the Buck case was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred, arbitrarily or unreasonably, but because the statute, as construed and applied, invaded a field reserved by the Commerce Clause for Federal Regulation."

The quotation, just made, from the opinion of Justice Brandeis in the Bush case, fairly shows that the court based its decision in that case upon the Commerce Clause of the Federal Constitution; but, that, it might, if necessary, have rested the opinion upon the arbitrary and unreasonable provisions of the statute. That Ordinance No. 1945 in the instant case is arbitrary and unreasonable, and should be held unconstitutional and void on that ground also, will sufficiently appear from an application of the opinion of the Supreme Court of the United States in *Yick Wo* v. *Hopkins,* supra.

Also, a case directly in point, it that of *Cicero Lumber Co.* v. *Cicero,* 176 Ill. 9 (68 Amer. State Reports 155 at pages 163 to 165) where a similar ordinance was held to be unconstitutional and void by the Supreme Court of Illinois, the Court, among other things, saying:

"The ordinance, in so far as it invests the Board of Trustees the discretion here indicated, is unreasonable. It prohibits that which, in itself and as a

general thing, is perfectly lawful, and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion when the whole matter should be regulated by permanent local provisions, operating generally and impartially. The ordinance is not general in its operation; it does not affect all citizens alike, who use traffic vehicles. It is only persons, driving traffic vehicles upon the boulevards without the permission of the Board of Trustees, who are subjected to the penalties of the ordinance. The ordinance in no way regulates or controls the discretion vested thereby in the Board. It prescribes no conditions upon which the special permission of the Board is to be granted; thus, the Board is clothed with the right to grant the privilege to some and to deny it to others. Ordinances which thus invest a City Council, or a Board of Trustees, with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured. This position is sustained by the weight of authority."

The Indiana Supreme Court has many times condemned similar ordinances. The cases, so holding, we have cited in the "Brief of Argument," Point XII, and to which we most respectfully refer the Court.

Again, that it was the intention of the Indiana Legislature to withdraw and withhold from municipal corporations, and vest in the Public Service Commission of Indiana, jurisdiction over carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, most certainly appears from Chapter 46, Acts of 1925 Indiana General Assembly, cited herein and printed in Appendix A of this brief; and, also, the same further appears in Chapter 213, Acts of 1925, Indiana General Assembly, cited herein and printed in this brief as Appendix B, in so far as the same is applicable to the questions here involved. In other

words, these two chapters of the laws of Indiana, passed at the same session of the Legislature, show conclusively that it was the intention of the Legislature to regulate automobile traffic; the use of automobiles and motor vehicles fully within the State; making the regulation and control of the same state wide, rather than to leave the same to the regulation or control of any given municipality, which could but result in confusion. By Section 45 of Chapter 213, supra, the Legislature expressly declared void all ordinances theretofore or thereafter passed by any municipal corporation seeking to restrict the use of motor vehicles within the State.

Since this case was originally heard in the United States District Court the Supreme Court of Indiana, in two cases, has given effect to Section 45 supra, being Section 17 of the original Automobile Regulation Act of Indiana, and in each instance the Supreme Court has declared that unless the ordinance, sought to be passed and enforced by any municipality of the State, was within the exception expressed in said Section 45 such ordinance would be inconsistent and in conflict with the State law and, therefore, null and void and without the jurisdiction of the municipality to pass.

See: *Hoosier Mfg. Co.* v. *Berry,* Indiana Supreme Court, December, 1925 (149 N. E. 723 at p. 724, Col. 2).
Brownlee v. *City of Princeton,* Indiana Supreme Court, June, 1926 (152 N. E. 828 at p. 829, Col. 2 to p. 830, Col. 1).

Said Section 45 of Chapter 213, Indiana Laws 1925 above referred to, provides that:

> *"Except as herein otherwise provided, no city, town or other municipal corporation, shall have any power or authority to make any ordinance, by-laws or resolution, limiting or restricting the use or speed of motor vehicles or motor bicycles, and no ordinance, by-laws or resolution heretofore or hereafter made*

by any city, town or other municipal corporation within this State, by whatever name known or designated, in respect to, or limiting the use of, motor vehicles or motor bicycles, shall have any force, effect or validity, and all such ordinances, by-laws and resolutions are hereby declared to be of no validity or effect." (See: Appendix B in this Brief.)

The Legislature, by Chapter 213, Acts of 1925 supra, specifically defined a motor vehicle to include:

"automobiles, locomobiles, and all other vehicles propelled otherwise than by muscular power, except traction engines, tractors used exclusively in drawing or propelling farm machinery, road rollers, etc." (See: Appendix B, Section 1.)

The Legislature also defined auto bus to mean:

"Any motor vehicle used for the purpose of carrying passengers on a regular schedule of time and rates between terminii, either wholly within the corporate limits of a city or between towns or cities."

(See: Section 1, Chapter 213 Supra, Appendix B.)

By Section 4, Chapter 46, Acts of 1925 supra, the Legislature defined the term motor vehicle to mean:

"An automobile or other self-propelled vehicle not operated or driven upon fixed rails or tracks, including any trailer thereto attached, and the term public highway, as used in this act, means any public road, street, avenue or alley in the State of Indiana."

(See: Appendix A in this Brief.)

The Legislature, by defining the terms specifically used in said Chapters 46 and 213 supra, both passed at the same session of the Legislature, must be held to have had a definite purpose in mind to co-ordinate the two acts for the purpose of regulating motor vehicle traffic

within the State of Indiana, and particularly motor vehicle carriers of persons and property. Neither of the terms, "motor vehicle" nor "auto bus," as defined in either of the acts, fall within the exception expressed in Section 45 to Chapter 213 supra. Therefore, it follows, that applying the decisions of the Supreme Court of Indiana last above cited, that, while the Supreme Court of Indiana has not directly passed upon the construction of Chapters 46 and 213 supra to this date, that, when the Court is required to construe said Acts that they will hold as above that it is only something that is within the exception, if anything, that is left to the action of the municipality, and that all attempted action not wihin the exception, by ordinance or by whatever name used, is of no validity, regulating or attempting to restrict the use of motor vehicles. In other words, the Legislature must be held to have undertaken to regulate the subject of motor vehicle transportation, and when the Legislature has acted upon a subject matter its action must be held to be exclusive, particularly as to municipalities having no power except what is conferred upon them by express provision to be found in a legislative act. Municipalities are not given power in Indiana by the Constitution, but have only such powers as the Legislature sees fit to delegate to the municipalities by express legislative enactment.

The importance of the definition of terms used in Chapter 46 and Chapter 213 of the Acts of 1925, supra, cannot be overlooked, for, it is a settled rule of statutory construction, that:

> "Where the Legislature expressly states the meaning which is to be given to a term used in an Act, that meaning must be given to such terms as so used."

See: *Chicago & Eastern Illinois R. Co.* v. *State ex rel Ketcham,* 153 Ind. 138, at p. 139.

The only exceptions permitted by the Legislature in Section 45 of Chapter 213, supra, is to be found in the following sentence of said Section 45, supra, to-wit:—

> "Nothing in this Act contained shall be construed as affecting the power of cities, towns and other municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles, which are used within the limits of such municipal corporations for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions of this Act."

(See: Appendix B in this Brief.)

The Legislature, having defined in said Chapter 213 supra, and given a particular meaning to auto bus and motor vehicle, *defining auto bus as a motor vehicle used for the purpose of carrying passengers on a regular schedule of time and rates,* etc., excludes the idea that such a motor vehicle would fall within the terms of either motor trucks or motor driven commercial vehicles. Moreover, the use of motor trucks and motor driven commercial vehicles, mentioned in the exception, is expressly limited by the exception to those used within the limits of such municipal corporations for public hire. A motor truck is not necessarily, either by general definition or by express definition, a motor vehicle used in the carrying of passengers for hire. Neither is a motor driven commercial vehicle, an auto bus, or motor vehicle used in the carrying of passengers for hire. Hence, unless we should attempt to attribute a meaningless use of definitions to the Legislature, we are forced to the conclusion that it was the intention of the Legislature to so define motor vehicles used in the carrying of passengers for hire that no conflict of jurisdiction might occur between the Public Service Commission of Indiana, to which jurisdiction was given expressly by Chapter 46

of the Acts of 1925 supra, over motor vehicles engaged in carrying persons and property for compensation on the public highways of the State, and the cities and towns of the State. This construction, respondent submits, accords with, and gives to, the acts of the Legislature, passed at the same session, a fair and reasonable construction and purpose. Any other construction of Chapters 46 and 213 supra, is to open the door to conflict between the Public Service Commission of Indiana and every city and town within the State. Therefore, rspondent most respectfully submits, that, the ordinance here in question is void for want of jurisdiction in the City of Hammond to enact the same. It is void in that it conflicts with the State and Federal Constitutions as herein pointed out. It is unreasonable and void because of its many discriminations. It is unreasonable and void in that it gives arbitrary power to the Board of Public Works without any uniform or general principle of guidance. It is unreasonable and void considered from any standpoint of law applicable to the facts in the instant case. It is in conflict with the Commerce Clause of the Federal Constitution. So, we submit, that the United States Circuit Court of Appeals was entirely right in saying in its opinion, that:

> *"There are several reasons why we are of opinion that the bill should not have been dismissed."*

The opinion and judgment of the United States Circuit Court of Appeals should be in all things affirmed.

Most respectfully submitted,

WILLIAM J. WHINERY,

Attorney for Respondent.

"APPENDIX A"

Complete Copy of Chapter 46, Acts of 1925, Indiana General Assembly, Pages 138 to 142 Inclusive.

CHAPTER 46

AN ACT entitled "An act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, and supplemental to an act entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and declaring an emergency."

(S. 16. Approved March 4, 1925.)

MOTOR VEHICLE CARRIERS—DECLARED TO BE PUBLIC UTILITIES.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, that now or hereafter may own, operate, manage or control any motor vehicle, except as hereinafter provided, for the purpose of transporting passengers or property for compensation as a common carrier upon any of the public highways of the State of Indiana is hereby declared to be a public utility within the meaning of the act of the general assembly of the State of Indiana entitled: "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and, except as

herein provided, subject to all the terms and provisions of said act, in so far as the terms and provisions of said act may be reasonably applicable to such carriers.

PUBLIC SERVICE COMMISSION—CERTIFICATE OF CONVENIENCE AND NECESSITY—EXISTING CARRIERS.

SEC. 2. No motor vehicle, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until after there shall have been obtained from the Public Service Commission of Indiana a certificate declaring that public convenience and necessity require such operation, and no certificate shall be issued except as hereinafter provided until after a public hearing and a consideration of the service, if any, rendered in the territory of the proposed motor vehicle operation by other motor vehicle common carriers. Such commission is empowered to adopt rules and regulations to govern applications for certificates of convenience and necessity and hearings thereon: *Provided, however,* That the owner of any motor vehicle common carrier service which has been lawfully operated over a fixed route with a substantially regular schedule, upon the highways of the state for a period of ninety days immediately prior to the taking effect of this act and is engaged in such operation at the time of filing application therefor, shall receive from the public service commission a certificate of convenience and necessity to continue such operation, upon submitting to the Public Service Commission within thirty days from the taking effect of this act, verified proof in writing of such continued service and complying with the provisions of section 3 of this act, and any certificate owned, held, or obtained by any such carrier may be sold, assigned, leased, bequeathed or transferred as other property upon approval by the commission.

DAMAGES ARISING FROM NEGLIGENCE—BOND, INDEMNITY, INSURANCE.

SEC. 3. No motor vehicle, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until there shall have been filed with the Public Service Commission of Indiana, a bond, indemnity undertaking or policy of insurance, executed by a company, mutual association or reciprocal exchange legally authorized to execute such instruments in the State of Indiana and to the approval of said commission, guaranteeing the payment of all damages which may result from any and all accidents due to negligence in the use or operation of such motor vehicle, which bond, indemnity, undertaking or policy shall be payable to the State of Indiana, for the benefit of persons who may suffer personal injuries or property damages on account of such negligence, and shall be in such amount as shall be fixed by such commission at the time of granting a certificate of convenience and necessity for the operation of such motor vehicle.

DEFINITION OF "MOTOR VEHICLE" AND "PUBLIC HIGHWAY."

SEC. 4. The term "motor vehicle" as used in this act means an automobile or other self-propelled vehicle not operated or driven upon fixed rails or track, including any trailer thereto attached; and the term "public highway" as used in this act means any public road, street, avenue or alley in the State of Indiana.

VEHICLES TO WHICH ACT IS INAPPLICABLE—LOCAL CONTROL.

SEC. 5. None of the provisions of this act shall apply to the owning, operation, management or control of taxicabs, hotel buses, funeral buses or school buses or to owning, controlling, operating, or managing motor pro-

pelled vehicles the major use of which is for private business of the owners and the use of which for hire is only casual or occasional or under special contract or arrangement: and PROVIDED FURTHER, That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested persons filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the Supreme Court. A taxicab as the term is used herein means a motor vehicle while being used for the performance of a contract for the transportation of a passenger or passengers for hire to and from points chosen or designated by the passenger or passengers and running over any available route between said points; but not at the time being operated over or along a definite, advertised, announced or substantially fixed route from, to or between definite or substantially fixed terminals, locations or districts, or according to substantially fixed or announced times or interval of arrival or departure; and a hotel bus, as the term is used herein, means a motor vehicle operated by a hotel company, owner or proprietor in the conveyance of guests between such hotel and a railroad or interurban station.

STEAM OR ELECTRIC CARRIERS, MOTOR VEHICLES OF.

SEC. 6. Any motor vehicle engaged in transporting persons or property upon any of the public highways of

the state for any steam or electric common carrier between points on the railroad of such carrier or elsewhere, shall be regarded as a motor vehicle owned, operated, managed or controlled for the purpose of transporting passengers or property for compensation as a common carrier within the meaning of this act.

CONSTRUCTION OF THIS ACT.

SEC. 7. Each section of this act is independent of each of the other sections, and adjudication that any provision of this act is invalid shall not affect the validity of any other provision hereof, but such other provisions shall be and remain in full force and effect.

PENALTIES.

SEC. 8. Any person, firm or corporation which shall violate any of the provisions of this act or fail or refuse to obey any lawful order of the public service commission of Indiana made hereunder shall, on conviction, be fined not less than ten dollars or more than one hundred dollars for each offense, and each day such violation shall continue shall constitute a separate offense.

LEGAL AND EQUITABLE REMEDIES AVAILABLE FOR ENFORCEMENT.

SEC. 9. All legal and equitable remedies of a civil nature to enforce the provisions of this act or of any lawful order, rule or regulation made pursuant hereto may be used by said commission or any person or corporation having a special interest in such enforcement.

HIGHWAY COMMISSION—OTHER AUTHORITIES —JURISDICTION, POWERS.

SEC. 10. This act shall be supplementary to the act entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the rail-

road commission on the public service commission," approved March 4, 1913: PROVIDED, HOWEVER, That none of the provisions of this act shall operate to deprive the state highway commission of Indiana or any other public authorities of any jurisdiction it or they now has or have or which may hereafter be conferred upon it or them over the public highways of the state, nor prevent said state highway commission of Indiana or other authorities from suspending at any time, the right of motor buses to operate on any public highway where necessary to preserve said highway.

APPENDIX B

Copy of Parts of Chapter 213, Acts of 1925, Indiana General Assembly, Pages 570 to 607 Inclusive.

CHAPTER 213

AN ACT providing for the registration and licensing of motor vehicles, motor bicycles, tractors, trailers and semi-trailers, for the regulation of the use and operation thereof on the public highways, defining chauffeurs and providing for the examination and licensing thereof, the suspension and revocation of licenses, and the transfer of ownership, requiring the keeping of certain records, of motor vehicles, motor bicycles and motor trucks for which storage, supplies or repairs are furnished, providing that liens may be taken thereon, and prescribing penalties for the violation thereof.

(H. 103. Approved March 14, 1925.)

DEFINITIONS.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF INDIANA, That the words and phrases used in this act are herewith defined and for the purpose of this act shall be construed as follows, except when otherwise expressly provided: The term "motor vehicle" shall be construed to include auto-

mobiles, locomobiles, and all the other vehicles propelled otherwise than by muscular power, except traction engines, tractors used exclusively in drawing or propelling farm machinery, road rollers, road and street sprinklers, motor vehicles running only upon rails or tracks, fire engines and wagons, municipally owned ambulances and police patrol wagons, but nothing in this act shall be construed to apply to or affect bicycles or tricycles or such other vehicles as are propelled exclusively by muscular power.

"Trailer" shall be construed to mean any vehicle without motive power designed for carrying property or passengers wholly on its own structure and being drawn by a motor vehicle.

"Semi-trailer" shall be construed to mean any vehicle without motive power designed for carrying property or animals and having two wheels and which is so attached to a tractor, truck or other motor vehicle that the load carried will rest partly on the semi-trailer and partly on the motor vehicle to which it is attached.

"Motor trucks and delivery cars" shall be construed to mean motor vehicles having bodies, beds, boxes or slip-on bodies attached thereon and used in carrying commodities, articles or merchandise of any kind.

"Motor bicycles" shall be construed to mean a bicycle having two wheels and propelled by a motor. The attachment of a side car shall not affect the classification or definition of the term.

"Chauffeur" shall be construed to mean any person acting as an employe, or part or all of whose regular duties require him to operate or drive a motor vehicle owned by his employer.

"Local authorities" shall be construed to include all officers of counties, cities or towns as well as all boards

and other public officials of such counties, cities and towns.

"State" as used in this act, except when otherwise expressly provided, shall also include territories and federal districts of the United States.

"Owner" shall be construed to also include any person, firm, association or corporation renting or leasing a motor vehicle and having exclusive use thereof for a period longer than thirty (30) days.

"Public highway" shall be construed to include any highway, country road, state road, public street, avenue, alley, park, parkway or public place in any county, city or town, except any speedway which may have been or may be expressly set apart by law for the exclusive use of horses and light carriages.

"Auto bus" shall be construed to mean any motor vehicle used for the purpose of carrying passengers on a regular schedule of time and rates between termini, either wholly within the corporate limits of a city or between towns or cities.

"Tractor" shall be construed to include tractors, tractor trucks, pull-wagons, steel mules or any motor device designed for drawing or propelling trailers, semi-trailers or vehicles of any kind, excepting those used exclusively in drawing or propelling farm machinery, grain and bean separators, clover hullers, ensilage cutters, corn shredders, corn hullers and portable sawmills.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 570 to 571.

REGISTRATION FEES.

SEC. 9. The fees hereinafter prescribed in this section shall be paid to the secretary of state upon the registration or re-registration of a motor vehicle, motor bicycle,

tractor, trailer, semi-trailer, manufacturer or dealer or chauffeur for each calendar year: * * *

A fee of six dollars ($6.00) per person per annum, at the rated carrying capacity, allowing sixteen (16) inches for each person, exclusive of the driver, shall be paid upon the registration or re-registration, for each calendar year, for each motor bus operated for hire over any of the public highways of the state on a regular schedule of time and rates: PROVIDED, That the fee for motor buses operating wholly within the corporate limits of any city or town shall be one-tenth (1/10) of the regular registration fee for motor buses: PROVIDED, FURTHER, That motor vehicles used in the transportation of school children, whether the entire motor vehicle, including the body and chassis, or the body only, is owned by the school corporation, shall not be classed as motor buses, nor shall such motor vehicles be required to pay the seat fee as hereinbefore provided in this paragraph. * * *

The fee for owner's duplicate plates shall be fifty cents ($0.50) for each plate. A fee of ten dollars ($10.00) per person per annum at the rated carrying capacity, allowing sixteen inches (16") for each passenger, exclusive of the driver, shall be paid upon the registration or re-registration for each calendar year, for each motor bus operated for hire over any of the public highways of the state and engaged exclusively in interstate commerce: PROVIDED, HOWEVER, That motor buses engaged exclusively in interstate commerce shall not be authorized to operate upon and over the highways within the State of Indiana, until they have complied with all the general and special laws of the State of Indiana, pertaining to the operation of motor vehicles upon the public highways of this state: and, PROVIDED, That no motor bus or motor truck engaged exclusively in interstate commerce shall be authorized or permitted under its license, to en-

gage in interstate commerce within the State of Indiana, without having complied with all the provisions of the law concerning permits, certificates of convenience and necessity, and regulations of the transportation of interstate commerce.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 575 to 578.

STOP LIGHTS ON BUSES.

SEC. 33. Every motor bus used in transporting passengers for hire shall be equipped with a stop light, which shall be so attached and adjusted that when the service brakes of such motor bus are applied, a red light will be automatically displayed on the rear of such motor bus in such manner and with such distinctness that the operator of any motor vehicle which may be following in or approaching from the rear, will have adequate warning that such motor bus is about to stop or slow down.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 591 to 592.

NO FEES ON MOTOR VEHICLES AND MOTOR BICYCLES EXCEPT STATE FEES.

SEC. 44. No owner of any motor vehicle or motor bicycle except motor trucks, motor driven commercial vehicles, and motor vehicles used in transporting passengers for hire, who shall have obtained a certificate of registration (from the secretary of state, and who shall have paid the registration) fee, as hereinbefore provided, shall be required to pay another license fee whatsoever, or to obtain any other license or permit to use or operate any such motor vehicle or motor bicycle on the public highways, nor shall any such owner be required to display upon his motor vehicle or motor bicycle any other number

than that issued by the secretary of state, nor shall any such owner be excluded or prohibited from or limited in the free use of his motor vehicle or motor bicycle, nor shall he be limited as to the rate of speed, except as herein provided, at which he may drive upon any public highway at any time when such public highway is or may hereafter be opened to the use of persons having or using other vehicles.

MUNICIPAL REGULATIONS—CITY AND TOWN LICENSES.

SEC. 45. Except as herein otherwise provided, no city, town or other municipal corporation shall have any power or authority to make any ordinance, by-laws or resolution, limiting or restricting the use or speed of motor vehicles or motor bicycles, and no ordinance, by-laws, or resolution heretofore or hereafter made by any city, town or other municipal corporation within this state, by whatever name known or designated, in respect to or limiting the use of motor vehicles or motor bicycles, shall have any force, effect or validity, and all such ordinances, by-laws and resolutions are hereby declared to be of no validity or effect. Nothing in this act contained shall be construed as affecting the power of cities, towns, and other municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles which are used within the limits of such municipal corporations for public hire, or from making and enforcing reasonable traffic and other regulations, except as to rates of speed, not inconsistent with the provisions of this act. A license issued by any city or town for any motor truck or motor driven commercial vehicle used for hire shall be valid in every city and town of the state for and during the year for which such license is issued, and only one such city or town license shall be required for any such motor vehicle for any one year.

PUBLIC PARKS — REGULATION OF MOTOR VEHICLES.

SEC. 46. Local authorities having jurisdiction over public parks shall not, by the terms of this act, be prohibited from adopting and enforcing reasonable ordinances, rules and regulations concerning the speed at which motor vehicles or motor bicycles may be driven or operated within the limits of any such park. Such local authorities shall, by signs conspicuously placed, indicate the rate of speed permitted by such ordinances, rules or regulations.

CEMETERIES—EXCLUSION OF MOTOR VEHICLES FROM.

SEC. 47. Motor vehicles or motor bicycles may be excluded from any cemetery or grounds used for the burial of the dead, by the authorities having jurisdiction over such cemeteries or grounds.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 597 to 598.

RIGHT OF WAY—PREFERENTIAL TRAFFIC STREETS AND HIGHWAYS—STOP INTERSECTIONS

SEC. 53. Except as hereinafter otherwise provided, every motor vehicle or motor bicycle traveling upon any public highway shall give the right of way to any other motor vehicle, motor bicycle or any other vehicle approaching along an intersecting highway from the right and shall have the right of way over those vehicles approaching along an intersecting highway from the left. Motor vehicles and motor bicycles operated by municipal police and fire departments, motor vehicles used in transporting the United States mails, and ambulances shall have the right of way over all other motor vehicles,

motor bicycles and other vehicles. The proper authorities of cities may designate certain streets or boulevards as preferential traffic streets and prescribe rules regulating the traffic crossing over or turning into such streets or boulevards, and such authorities shall likewise have the power to regulate the traffic at such points or street intersections where traffic officers or automatic signals are stationed. The state highway commission may designate certain state highways as preferential highways, and the traffic upon any such highway so designated shall have the right of way over the traffic crossing over or turning into such highways. The state highway commission shall also have the authority to designate any hazardous intersection as a "stop intersection," and to require all traffic approaching any such intersection to come to a full stop before passing over. Any such intersection designated as a stop intersection shall be indicated by appropriate signs or automatic signal devices, and if signs are used on any such highway they shall be erected not less than fifty (50) feet from the middle of the intersecting highway, and if such signs are erected on a road under jurisdiction of a board of county commissioners or a township trustee, such board of commissioners or township trustee is hereby prohibited from interfering with the erection of such signs or removing same.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 602 to 603.

PENALTY.

SEC. 59. Any person who shall violate any of the provisions of this act for which no specific penalty is provided shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars ($25) and not more than five hundred dollars ($500), to which may be added imprisonment for a term of not to exceed one year.

PARTIAL INVALIDITY.

SEC. 60. If any section, provision or clause of this act shall be declared invalid, the remainder of the act, not otherwise invalid, shall not be thereby affected.

FEES—WHEN EFFECTIVE.

SEC. 61. Section 9 of this act, prescribing the fees to be paid on the registration or re-registration of motor vehicles, motor bicycles, tractors, trailers, semi-trailers or chauffeurs shall be in effect for the year 1926 and thereafter.

REPEAL.

SEC. 62. That an act entitled "An act defining motor vehicles and providing for the registration, numbering and regulation of same, defining chauffeurs and providing for the examination and licensing thereof, and providing for punishment for the violation of any of the provisions of this act," approved March 15, 1913, and all acts amendatory thereof and supplemental thereto are hereby repealed.

EMERGENCY.

SEC. 63. Whereas an emergency exists for the immediate taking effect of this act, therefore this act, except section 9, shall be in full force and effect from and after its passage.

See: Acts of 1925, Indiana General Assembly, Chap. 213, pages 606 to 607.

ALPHABETICAL LIST OF CASES CITED

A

Acts of 1925, Chapter 46, Indiana General Assembly, at pp. 138 to 142.
Acts of 1925, Chapter 213, Indiana General Assembly, at pp. 570 to 607.

B

Bessonies v. *City of Indianapolis,* 71 Ind. 189, pp. 197 to 198.
Bills v. *City of Goshen,* 117 Ind. 221, pp. 225 to 227.
Birdsell Mfg. Co. v. *Loughman,* 26 Ind. App. 359, p. 361.
Board v. *Johnson,* 173 Ind. 76, p. 87.
Bouge v. *Bennett,* 156 Ind. 478, pp. 480 to 486.
Brimmer v. *Rebman,* 138 U. S. 78 (34 Law Ed. 862.)
Brownlee v. *City of Princeton,* Indiana Supreme Court, June 1926 (152 N. E. 828 at p. 829, Col. 2 to p. 830, Col. 1.)
Buck v. *Kuykendahl,* U. S. Supreme Court, March 2, 1925 (Lawyers' Co-operative Pub. Co., Advance Opinions No. 10, pp. 301 to 303.)
Bullock v. *Robinson,* 176 Ind. 198, pp. 203 to 204.
Burns' Indiana Statutes, Vol. 1 Revision of 1914, Sections 118 and 119.
Bush & Sons Co. v. *Maloy,* U. S. Supreme Court, March 2, 1925 (Lawyers' Co-operative Pub. Co. Advance Opinions No. 10, pp. 303 to 305.)

C

Central Union Telephone Co. v. *Indianapolis Telephone Co.,* 189 Ind. 210 at p. 223.
Chicago & Eastern Illinois R. R. Co. v. *State ex rel Ketcham,* 153 Ind. 138 at p. 139.
Cicero Lumber Co. v. *Cicero,* 176 Ill. 9 (68 So. Amer. State Reports 155, pp. 163 to 165.)
City of Dallas v. *Gill,* Texas Civil Appeals 1918 (199 S. W. 1144.)

City of Elkhart v. *Murray*, 165 Ind. 304.
City of Nelsonville v. *Ramsey*, Ohio Supreme Court June 9, 1925 (148 N. E. 694, p. 696, Col. 1).
City of New Albany v. *New Albany Street R. R. Co.*, 172 Ind. 487 at p. 490.
City of Plymouth v. *Schultheis*, 135 Ind. 339.
City of Richmond v. *Dudley*, 129 Ind. 112.
City of Tulsa v. *Thomas*, Okla. Supreme Court, April 24, 1923 (214 Pac. 1070).
Conn v. *Board*, 151 Ind. 517, p. 526.

D

Dent v. *Oregon City*, Oregon Supreme Court, January 2, 1923 (211 Pac. 909).
Dickson v. *Poe*, 159 Ind. 492, pp. 494 to 498.
Dillon on Municipal Corporations, Vol. 1, 5th Ed., Par. 237.
Dillon on Municipal Corporations, Vol 2, 5th Ed., Pars. 601 to 602.
Dillon on Municipal Corporations, Vol. 2, 5th Ed., Par. 598, pp. 934 to 935.
Dillon on Municipal Corporations, Vol. 3, 5th Ed., Par. 1122.

E

Eichels v. *Evansville Street Ry. Co.*, 78 Ind. 261 at p. 263.
Elizabeth City vs. Banks, 150 N. C. 407 (64 S. E. 189) (22 L. R. A. N. S. 925).
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Pittsburgh, etc., Ry. Co. v. *Town of Crown Point*, 146 Ind. 421.

R

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S

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Shay v. *City of Muncie*, 148 Ind. 14, p. 21.

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State v. *Dorsey*, 167 Ind. 199, p. 204.

State v. *Gerhardt*, 145 Ind. 439, pp. 479 to 493.

State ex rel Holt v. *Denny*, 118 Ind. 449, pp. 475 to 480.

State ex rel Western Construction Co. v. *Board of Commissioners*, 166 Ind. 162, pp. 196 to 198.

T

Town of Longview v. *City of Crawfordsville*, 164 Ind. 117, pp. 121 to 125.

W

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Wabash R. R. Co. v. *Young*, 162 Ind. 108, pp. 103 to 105.

Wright v. *Board, etc.*, 82 Ind. 335.

Y

Yick Wo v. *Hopkins*, 118 U. S. 356 to 374 (30 Law Ed. 220 to 228).

End.

SUPREME COURT OF THE UNITED STATES.

No. 67.—October Term, 1927.

City of Hammond, Petitioner, *vs.* Schappi Bus Line, Inc. } On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 21, 1927.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, which was commenced in the federal court for Indiana in July, 1925, is here on certiorari to the Circuit Court of Appeals. 273 U. S. 675. Schappi Bus Line, Incorporated, an Illinois corporation, seeks to enjoin the City of Hammond, Indiana, from enforcing its ordinance No. 1945 concerning the operation of motor busses, adopted May 23, 1925.[1] Section 1 prohibits the operation of any busses (with an exception to be noted) on certain streets

[1] "No. 1495.

An Ordinance Regulating and Routing Certain Vehicles for Hire and Prohibiting Their Use of Certain Streets Within the City of Hammond.

Section 1. Be It Ordained by the Common Council of the City of Hammond, Indiana, that in order to promote public safety and order and to diminish the congestion of vehicular travel within said City, from and after the taking effect of this Ordinance, it shall be unlawful for any person, firm, or corporation owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon, or over any of the following parts of streets within said City of Hammond, to-wit:—

On Hohman Street from Russell Street to Michigan Avenue;

On State Street from Morton Court to Calumet Avenue;

On Sibley Street from the easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company where the same crosses Sibley Street westerly to Morton Court;

On Fayette Street from Hohman Street to Oakley Avenue.

Section 2. From and after the taking effect of this Ordinance, it shall be unlawful for any person, firm, or corporation, owning or operating any motor vehicle carrying passengers for hire, to stop such vehicle for the purpose of

which lead into and through the business district. Section 2 prohibits any busses (with the same exception) from stopping anywhere on any street in the City, either to load or to discharge passengers, but reserves to the Board of Public Works authority to grant, from time to time, permission, for periods not exceeding six months, to stop on portions of a few designated streets.

For some time prior to the adoption of the ordinance, Schappi, Incorporated, had owned and operated a line of motor busses between Chicago and Hammond; another between Calumet City, Illinois, and Hammond; and one from Calumet City through Hammond to East Chicago, Indiana. The business is chiefly interstate; and on at least one of the lines is wholly interstate. The bill charges that for reasons there set forth the ordinance is void; and alleges that, if enforced, it will compel abandonment of all existing bus lines operated by the plaintiff. The case was heard upon an application for an interlocutory injunction. The District Court denied it with-

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receiving or discharging passengers upon any street, alley, or other public place within said City; provided, that the Board of Public Works may, for any period not exceeding six months or successions thereof, permit such operation on any or all of the following designated parts of streets: Columbia Avenue between the South city limits and the right-of-way of the Michigan Central Railroad where the same crosses said Columbia Avenue; Sibley Street from Columbia Avenue to the Easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company; State Line Street from its Southerly terminus to its Northerly terminus at or near the right-of-way of said Michigan Central Railroad aforesaid; Rimbach Avenue from State Line Street to Ann Street; Ann Street from Rimbach Avenue to Russell Street; Russell Street from Ann Street to State Line Street, and for vehicles engaged strictly in interstate commerce any street or other public place North of 122nd Street and East of Calumet Avenue.

Section 3. Whoever violates any of the provisions of Sections 1 and 2 of this Ordinance shall, upon conviction, be fined in any sum not exceeding Fifty ($50.00) Dollars for each and every offense, but nothing in this Ordinance shall be construed to impair the obligation of any contract to which the City is a party under which such motor vehicles are now operated for hire within said City. Nothing herein shall apply to taxicabs.

Section 4. This Ordinance shall supplement such ordinances as are now in force, and repeal only so much of them or any part thereof as may be in direct conflict herewith.

GEO. J. WOLF,
President.

Attest:

ARNOLD H. KUNERT,
City Clerk."

out making any finding of fact and without an opinion or other statement of the reasons for its action. The decree was reversed by the Court of Appeals, which remanded the case "with directions to enter a decree granting the injunction", without specifying its scope. 11 F. (2d) 940. That court, also, made no finding on any controverted fact, save that it stated in its opinion "that the record does not show any valid reason for the passage of such an ordinance because of congestion in the streets. The record shows that there was a parking privilege on both sides of the streets in question of not less than an hour's limit, very generally availed of."

The City of Hammond has an area of about 35 square miles; much of it sparsely settled. It has 250 miles of streets. Its population is 60,000. The terminal of the three Schappi lines is on private property in the heart of the business district. Schappi claims that the ordinance not only denies access to its existing terminal, but practically prevents its busses from coming within miles of the business section. The City concedes that the ordinance prohibits the continued operation of Schappi busses over their existing routes. It urges that, despite the prohibition of § 1 of the ordinance, Schappi busses might use other streets which would bring them within a short distance of the business district—and that it might, under § 2, secure permits to stop for loading and unloading which would adequately serve its purposes.

The City asserts that the purpose of the ordinance is to prevent congestion of traffic and to promote safety. Schappi insists that there is no congestion, even in the business district, except such as results, at times, from the passing of railroad trains at grade and from the allowance of unreasonable parking privileges; that the prohibition by § 2 of stopping to load or unload passengers is obviously arbitrary; and that the real purpose of the ordinance is disclosed by § 3 which provides that it shall not "be construed to impair the obligation of any contract to which the City is a party under which motor vehicles are now operated for hire within the City." It appears that, under a contract made by the City in 1924, the Calumet Motor Coach Company is authorized, for a period of twenty-five years, to run its coaches on any street of the City and to stop on any street in order to load or discharge passengers.

Schappi asserts that the only purpose of the City in adopting the ordinance was to protect the Calumet Company from the competition of other bus lines. That company has, among other lines, one between Chicago and the business district of Hammond.

The issues of law are as serious and as numerous as those of fact. Schappi contends that the City lacked power to adopt any ordinance dealing with the subject, because by Act of March 4, 1925, Indiana General Assembly, pp. 138-142, and Act of March 14, 1925, Indiana General Assembly, pp. 570-607, the power to authorize use of the highways by motor busses was vested in the Public Service Commission and Schappi had obtained from it certificates of public convenience and necessity specifically authorizing the use of the existing routes. Schappi contends further that, even if the City possessed the power to deal with the general subject, this ordinance is void, under other state statutes and under the constitution of the State, because it is unreasonable, arbitrary, and grossly discriminatory. And Schappi claims that, regardless of any power which state statutes may have purported to confer upon the City, the ordinance is void under the Commerce Clause, because all of its busses are operated in interstate commerce and the business is chiefly interstate, although some of the busses carry some intrastate passengers. Rights under the Fourteenth Amendment also were asserted.

The opinion of the Court of Appeals states that the ordinance must be sustained, if at all, as a police regulation; that, as such, it was clearly discriminatory; and that it must be held void on that ground. Whether the invalidity results from the provisions of a state statute, or from the constitution of the State, or from the Fourteenth Amendment is not stated. The court did not discuss the statutory powers of the City; declined to consider the effect of the recent state legislation particularly relied upon by the plaintiff; and did not even mention claims urged under the Commerce Clause. If, as Schappi contends, the ordinance is void under the state law, there is no occasion to consider whether it violates the Federal Constitution and there could be no propriety in doing so. Whether it is void under the law of Indiana involves questions upon which this Court should not be called upon to pass without the aid which discussion by members of the lower courts familiar with the local law would afford.

On the other hand, if it should become necessary to consider Schappi's rights under the Commerce Clause, it is not fitting that these should be passed upon by this Court upon the present record and at this stage of the proceedings. The general principles governing the rights of motor vehicles to use the highways in interstate commerce, *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570; *Buck* v. *Kuykendall*, 267 U. S. 307; *George W. Bush & Sons Co.* v. *Maloy*, 267 U. S. 317; the power of the State to regulate their use, *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corporation* v. *Holyoke Street Ry. Co.*, 273 U. S. 45; *Morris* v. *Duby*, 274 U. S. 135, 143; and its power to require users to contribute to the cost and upkeep, *Hendrick* v. *Maryland*, 235 U. S. 610; *Clark* v. *Poor*, 274 U. S. 554, have been settled by these recent decisions.[2] But the facts here alleged may, if established, require the application of those principles to conditions differing materially from any heretofore passed upon by this Court.

The contentions made in the briefs and arguments suggest, among other questions, the following: Where there is congestion of city streets sufficient to justify some limitation of the number of motor vehicles to be operated thereon as common carriers, or some prohibition of stops to load or unload passengers, may the limitation or prohibition be applied to some vehicles used wholly or partly in interstate commerce while, at the same time, vehicles of like character, including many that are engaged solely in local, or intrastate, commerce are not subjected thereto? Is the right in the premises to which interstate carriers would otherwise be entitled, affected by the fact that, prior to the establishment of the interstate lines, the City had granted to a local carrier, by contract or franchise, the unlimited right to use all the streets of the City, and that elimination of the interstate vehicles would put an end to the congestion experienced? May the City's right to limit the number of vehicles, and to prohibit stops to load or unload passengers, be exercised in such a way as to allocate streets on which motor traffic is more profitable exclusively to the local lines and to allocate streets on which the traffic is less profitable

[2]The protection afforded by the Fourteenth Amendment to motor carriers for hire using the highways exclusively in intrastate commerce was considered in Packard *v.* Banton, 264 U. S. 140, and in Frost & Frost Trucking Co. *v.* Railroad Commission, 271 U. S. 583. See also Hess *v.* Pawloski, 274 U. S. 352.

to the lines engaged wholly, or partly, in interstate commerce? Is limitation of the number of vehicles, or prohibition of stops to load or unload passengers, of carriers engaged wholly, or partly, in interstate commerce, justifiable, where the congestion could be obviated by denying to private carriers existing parking privileges or by curtailing those so enjoyed? Are the rights of the interstate carrier in the premises dependent, in any respect, upon the dates of the establishment of its lines, as compared with the dates of the establishment of the lines of the local carrier?

These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could now be made with confidence. The answer denied many of the material allegations of the bill. The evidence consists of the pleadings and affidavits. The pleadings are confusing. The affidavits are silent as to some facts of legal significance; lack definiteness as to some matters; and present serious conflicts on issues of facts that may be decisive. For aught that appears, the lower courts may have differed in their decisions solely because they differed as to conclusions of fact. Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.

There is an added reason why this Court should not now make the findings of fact or rulings of law involved in these contentions. The Court of Appeals erred in assuming, as its opinion discloses, that the case had been submitted below as upon final hearing; and that the appeal before it was from a final decree dismissing the bill. The appeal was from the interlocutory decree denying the preliminary injunction; and the record discloses no later proceedings in the District Court. The case was not yet ripe for final disposition by the Court of Appeals. Compare *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, 283. Findings and rulings if now made on the basis of the evidence presented at the hearing on the application for the temporary injunction, might be rendered of no avail by the presentation of other or additional evidence when the case comes on for final hearing.

Under these circumstances, we deem it proper that, without costs in this Court to either party, the decree of the Circuit Court of Appeals be modified by recognizing that the decree in the District Court was only interlocutory, by directing an injunction pending the suit, and by remanding the cause to the District Court for proceedings on final hearing, with liberty to that court, among other things, to allow amendment of the pleadings.[3]

Decree modified and cause remanded to District Court.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[3]Compare Estho *v.* Lear, 7 Pet. 130; Chicago, Milwaukee & St. Paul Ry. Co. *v.* Tompkins, 176 U. S. 167, 179; United States *v.* Rio Grande Dam & Irrigation Co., 184 U. S. 416, 423; Lincoln Gas & Electric Light Co. *v.* Lincoln, 223 U. S. 349, 364.